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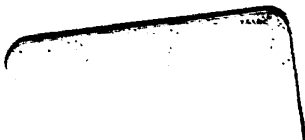
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REPORTS

OF

ADMIRALTY CASES,

ARGUED AND ADJUDGED IN THE

DISTRICT COURTS OF THE UNITED STATES,

FOR THE

DISTRICT OF MICHIGAN, NORTHERN DISTRICT OF OHIO,
SOUTHERN DISTRICT OF OHIO, WESTERN DISTRICT
OF PENNSYLVANIA, NORTHERN DISTRICT OF
ILLINOIS, DISTRICT OF MISSOURI, AND
EASTERN DISTRICT OF LOUISIANA,
FROM 1842 TO 1857.

By JOHN S. NEWBERRY,
OF THE DETROIT BAR.

VOLUME I.

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THIS VOLUME

IS DEDICATED TO

THE HON. ROSS WILKINS,

**JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MICHIGAN,**

AND TO

EBER B. WARD, ESQ.;

**AS A SLIGHT TRIBUTE OF ESTEEM AND RESPECT, AND AS A
TOKEN OF GRATEFUL REMEMBRANCE FOR THE MANY
PROFESSIONAL AND PERSONAL ACTS OF KIND-
NESS RECEIVED FROM THEM, BY THE
REPORTER.**

JUDGES
WHOSE DECISIONS ARE REPORTED
IN THIS VOLUME.

HON. ROSS WILKINS, *Of the District of Michigan.*

HON. H. V. WILLSON, *Of the Northern District of Ohio.*

HON. H. H. LEAVITT, *Of the Southern District of Ohio.*

HON. THOMAS IRWIN, *Of the Western District of Pennsylvania.*

HON. THOMAS DRUMMOND, *Of the Northern District of Illinois.*

HON. ROBERT W. WELLS, *Of the District of Missouri.*

HON. THEO. H. MCCAULEY, *Of the Eastern District of Louisiana.*

P R E F A C E.

IN this volume are collected the most important admiralty decisions, of seven districts of the United States, bordering upon the great northern lakes and the Mississippi river and its tributaries, for the last ten years.

The admiralty courts have been gradually growing into favor with those doing business upon these waters; and they are fast absorbing the entire mass of maritime litigation growing out of the vast shipping interest and extended commerce of our inland navigation. And up to the present time, there has been no effort made to present in an authentic form, any of the admiralty decisions of the eminent judges presiding over these courts; but the profession have been compelled to rely upon newspaper reports, and tradition, for their knowledge of the decisions that may have been rendered.

The want of such a book of reports has been often felt by those practicing in the admiralty courts; and it was to supply that want, that the reporter undertook to gather from the inland admiralty courts the materials forming the present volume.

The author takes this opportunity to acknowledge with pleasure, the great obligation he is under to the judges whose decisions are herein reported, for their full and hearty co-operation and assistance in enabling him to present to the profession so complete, and as he hopes will prove, so valuable an addition to the admiralty learning of the country.

He also would express his thanks to the many members of

the profession, from Louisiana to Michigan, who have so kindly and promptly given so much valuable assistance in furnishing statements of facts, and memoranda of arguments upon the trial of the different cases.

The publication of these admiralty reports will be continued, and will probably hereafter contain the decisions of other districts not reported in this volume.

Detroit, March 20, 1857.

JOHN S. NEWBERRY,

Reporter.

T A B L E

OF THE

C A S E S R E P O R T E D .

A.		Broadwell et al. v. Keys, Maltby et al.	171
America, The Tackle of Steamboat ada. E. K. Bruce	195	Bruce, B. F. v. The Schooner L. B. Goldsmith	123
Amado, Schooner, and Cargo ada. Rogers and the United States	400	Bruce, E. K. v. The Steamboat America's Tackle, &c.	195
Anita, Schooner, and Steamboat Anglo Norman and Schooner Jane E. Williams	492	Buckeye State, The Steamboat ada. Stillman, Allen & Co.	111
Anglo Norman, Steamboat, and Schooner Jane E. Williams, ada. Martinez	492	Buckeye State, The Steamboat ada. Lewis Ives	69
Arctic, Steamboat, and Schooner M. Dousman	236	Buffalo, The Propeller ada. Johnson L. Hall	115
A. Rossiter, Propeller ada. Ward et al.	225	Butler et al. ada. Broadwell et al.	171
Arrow, Steamboat ada. Butler	59	Butler v. The Steamboat Arrow	59
Asa R. Swift, The Steamboat ada. Russel	553	C.	
Ashbrook et al. v. The Steamboat Golden Gate	296	Cabot, The Ship ada. Mc Donald et al.	348
Atlantic, The Brig ada. Mailland	514	Carroll et al. v. The Steamboat T. P. Leathers	432
Atlantic, the Steamboat, and The Propeller Ogdensburgh	139	Cartwell et al. v. The Ship John Taylor	341
B.		Cavaroc & Co. ada. Eames, Master of Ship Horatio	528
Bates, Benson et al. v. The Steamboat Natchez	489	C. D. Jr., The Steamboat ada. Lal-lande and Tong	501
Bella Donna ada. Portevant	510	Charles Mears, The Propeller ada. Parmalee	197
Bella Donna ada. Owners of Schooner Louisa	510	Charles, The Ship ada. Evans et al.	329
Belleville, The Steam Ferry Boat, and Steamship United States	497	Cleveland, The Propeller ada. Hunt Conner and The United States v. Bark Coosa	393
B. F. Bruce, The Propeller ada. Mil- ligan	529	Constitution, The Schooner, and Propeller Young America	101, 107
Bona, George W. v. Steamer Norma Brandywine, The Schooner ada. Emily Sageman	533	Coosa, The Bark ada. Conner et al.	393
Broadwell et al. v. Butler et al.	171	Culbertson et al. v. The Steamboat Southern Belle	481

TABLE OF THE CASES REPORTED.

D.		Harris et al. v. The Steamboat Henrietta	284
Delphos, The Bark ada. The Union Tow-Boat Company	412	H. D. Bacon, The Steamboat ada. Eads & Nelson	274
Dickenson v. The Steamboat Gore	45	Henrietta, The Steamboat ada. Harris et al.	284
Dresden, The Steamboat ada. Sinnott et al.	474	Hessian v. Steamboat Edw. Howard	522
Dudley et al. v. The Steamboat Superior	176	Hill & Conn v. The Steamboat Golden Gate	308
E.		H. M. Wright, The Steamboat ada. Walsh	494
Eads & Nelson et al. v. The Steamboat H. D. Bacon	274	Hunt v. The Propeller Cleveland	221
Eames, Master of Ship Horatio v. Cavaroc & Co.	528	I.	
Edson & Edson v. The Schooner L. B. Goldsmith	123	Indiana, The Brig, and the Propeller Buffalo	115
Edward Howard, The Steamboat ada. Hessian	522	Ingraham et al. v. The Brig Nayade	366
El Telegrafo and Cargo ada. The United States	383	Ives, Lewis v. The Steamboat Buckeye State	69
Emerson et al. v. The Bark Pandora	438	J.	
Empire State, The Brig ada. Russel	541	Jackson v. The Schooner Julia Smith	61
Evans et al. v. The Ship Charles	329	Jane E. Williams, The Schooner, The Steamboat Anglo Norman, and Schooner Anita	492
F.		James Morrison, The Steamboat, ada. The United States	241
Fashion, The Brig ada. Ward et al.	8, 41	Jenny Lind, The Barge ada. Williams	443
Fashion, The Steamboat ada. Moore & Foote	49	John Richards, The Schooner ada. Riggs	73
Fashion, The Steamboat ada. Newberry	67	John Taylor, The Ship ada. Cartwell	341
Forrester, The Steamboat ada. The United States	81	Julia Smith, The Schooner ada. Jackson	61
Foster v. The Steamboat Pilot No. 2	215	Juanita, The, and Cargo ada. The United States	352
Foster v. The Schooner Miranda	227	K.	
Franconet v. The Propeller F. W. Backus	1	Kerr, Robert v. The Ship Norman	525
F. W. Backus, The Propeller ada. Franconet	1	Keys, Maltby & Co. ada. Broadwell & Co.	171
G.		Kief & Lang v. The London	6
George Nicholas, The Bark ada. Starlevant	449	Kramme et al. v. The Ship New England	481
Georgia, The Steamboat, and Steamboat Dresden	474	Kynoch v. The Propeller S. C. Ives	205
Golden Gate, The Steamboat ada. Ashbrook et al.	296	L.	
Golden Gate, The Steamboat ada. Hill & Conn	308	Lallande and Tong v. The Steamboat C. D. Jr.	501
Gore, The Steamboat ada. Dickenson	45	Laurel, The Steamboat ada. The United States	269
Grand Jury, Charge to, by Judge McCaleb	323	H.	
H.		Hall, Johnson L. v. The Propeller Buffalo	115

TABLE OF THE CASES REPORTED.

xi

L. B. Goldsmith, The Schooner ada.		P.	
Bruce & Edson	123	Pacific, The Steamboat, and Brig Fashion	8, 41
London, The Steamboat ada. Kief & Lang	6	Pandora, The Bark ada. Emerson et al.	438
Louisa, Owners of Schooner v. Steamboat Bella Donna	510	Parmalee et al. v. Propeller Chas. Mears	197
Lucas v. The Steamboat Thomas Swann	158	Pearl, The Steamboat ada. McKee	129
Luther v. The Schooner Merritt Hunt	4	Pearl, The Steamboat, and Natchez, The Steamboat	489
M.		Pease, Geo. B. v. The Propeller Napoleon	37
Mailland v. The Brig Atlantic	514	Petrel, The Schooner, and The Steamboat Gore	45
Martinez v. The Steamboat Anglo Norman and Schooner Jane E. Williams	492	Pilot, No. 2, The Steamboat ada. Foster	215
May Queen, The Brig ada. Merriman	464	Pilot, The Schooner, and The Steamboat Pearl	129
McGinnis v. The Steamboat Pontiac	130	Planter, The Steamboat ada. The United States	262
McKee, Frederick v. The Steamboat Pearl	129	Plymouth, The Propeller ada. Scott	56
McDonald et al. v. The Ship Cabot	348	Pontiac, The Steamboat ada. McGinnis	130
M. Dousman, The Schooner ada. Ward et al.	236	Portevant v. The Steamboat Bella Donna	510
Merriman v. The Brig May Queen	464	R.	
Merritt Hunt, The Schooner ada. Luther	4	Randolph v. The Steamship United States	497
Milligan v. The Propeller B. F. Bruce	529	Riggs v. The Schooner John Richards	73
Miranda, The Schooner ada. Foster	227	Rodocanachi et al. ada. Soule	504
Montgomery et al. v. The Steamboat T. P. Leathers	421	Rogers and the United States v. Schooner Amado and Cargo	409
Moore and Foote v. The Steamboat Fashion	49	Russel, Geo. B. v. The Brig Empire State	541
N.		Russel, Geo. B. v. The Steamboat Asa R. Swift	553
Napoleon, The Propeller ada. G. B. Pease	37	S.	
Nayade, The Brig ada. Ingraham et al.	366	Sageman, Emily v. The Schooner Brandywine	5
Natchez, The Steamboat ada. Bates, Benson & Co.	489	Sam. Strong, The Schooner ada. Wick	187
New England, The Ship ada. Kramme	481	S. C. Ives, The Propeller ada. Kynoch	205
Newberry v. The Steamboat Fashion	67	Scott, Dwight v. The Propeller Young America	101, 107
Norman, The Ship ada. Robert Kerr	525	Scott v. The Propeller Plymouth	56
Norma, The Steamer ada. Geo. W. Bone	533	Sexton et al. v. The Steamboat Troy	176
O.		S. F. Gale, The Brig, and Schooner Miranda	227
Ogdensburgh, The Propeller ada. Ward et al.	139	Smith et al. v. The Steamboat Dresden	474
Ohio, The Bark ada. The United States	409	Soule v. Rodocanachi	504
Oregon, The Steamboat ada. Rodocanachi	504	Southern Belle, The Steamboat ada. Culbertson	461
Ottawa, The Steam Ferry Boat ada. The United States	536	Stevens et al. v. Steamboats S. W. Downs and Storm	459

Stillman, Allen & Co. v. The Steamboat Buckeye State	111	United States v. The Steamboat Jas. Morrison	241
St. Louis, The Steamboat, and Propeller A. Rossiter	225	United States v. Ship Juanita and Cargo	352
Story, Judge, Proceedings on announcement of death of	319	United States v. The Laurel	269
S. S. Prentiss, Proceedings on announcement of death of	315	United States v. Brig Nayade	366
Sturtevant et al. v. The Bark Geo. Nicholas	449	United States v. The Steam Ferry Boat Ottawa	536
Superior, The Steamboat ada. Dudley et al.	176	United States v. The Bark Ohio	409
S. W. Downs, The Steamboat, and Storm ada. Stevens	458	United States v. The Steamboat Planter	262
		United States v. The Steam Ferry Boat Wm. Pope	256
		United States, The Steamship ada. Randolph	497
T.		W.	
Troy, The Steamboat ada. Saxton et al.	176	Wagner for the United States v. Ship Juanita and Cargo	352
Thos. Swann, The Steamboat ada. Lucas	158	Walsh v. Steamboat H. M. Wright	494
Thompson ada. Ward	96	Ward v. Thompson	96
T. P. Leathers, The Steamboat ada. Carroll et al.	433	Ward et al. v. The Brig Fashion	8, 41
T. P. Leathers, The Steamboat ada. Montgomery et al.	421	Ward et al. v. The Propeller A. Rossiter	225
		Ward et al. v. The Schooner M. Dousman	236
		Ward et al. v. Propeller Ogdensburgh	139
		Wick v. The Schooner Sam. Strong	167
		Williams et al. v. The Barge Jenny Lind	443
		Wm. Pope, The Steam Ferry ada. The United States	256
U.		Y.	
Union Tow-Boat Company v. The Bark Delphos	412	Young America, The Propeller ada. Dwight Scott	101, 107
United States v. Schooner Amado and Cargo	400		
United States v. Bark Coosa	393		
United States v. El Telegrafo and Cargo	383		
United States v. The Steamboat Forrester	81		

DISTRICT OF MICHIGAN.

DECISIONS

OF THE

HON. ROSS WILKINS, JUDGE.

JOHN FRANCONET, Libellant *v.* THE PROPELLER F. W.
BACKUS, Respondent.

*District Court of the United States. District of Michigan. In
Admiralty.*

HON. ROSS WILKINS, JUDGE.

1. The jurisdiction of this court in cases of admiralty, does not rest upon the statute of 1845, but upon the constitution of the United States. It is not limited to tide waters, but embraces the lakes and navigable rivers, through which commerce is carried on between different states, or with a foreign nation.
2. When a vessel of the United States is duly enrolled and licensed, and has been engaged for years between Detroit and Buffalo, although she may have been for a short time at a foreign port, still the presumption is, that her crew were hired in a domestic port.

WILKINS, J.—This is a libel for seaman's wages, promoted by the first engineer of the propeller. The important exhibits in the libel, are as follows:—"That at the time of the contract for which suit is brought, and wherein the alleged services were rendered, the said vessel was and continued to be enrolled, and licensed and engaged in the business of navigation and commerce, between the ports of Detroit and Buffalo: that the libellant was employed on said boat by the agent thereof, by and for the year beginning and ending at the close of navigation in

each year: that for years previous to the close of navigation of 1851, the libelant, as engineer of said vessel, rendered appropriate services in that capacity: that at the close of navigation in the year 1851, he entered upon the fulfillment of another year's services upon said vessel, and continued in that capacity until about the 17th day of December, and that he was to receive the sum of \$550 per year."

All these exhibits in the libel, with the exception of the last, are fully admitted, and conceded in the answer filed by the intervening claimant; and even the last is conceded in a modified form by the reduction simply of \$50, on the year's salary.

The answer stating: "that the libelant had been employed on said propeller by respondent at the close of navigation of 1851, as first engineer for a year thereafter, and was to receive for his services in that capacity—not the sum of \$550, but the sum of \$500—and that, under said contract, the libelant did enter upon the performance of the services for the year for which he had been employed."

These admissions in the answer, obviate the necessity of any inquiry into the proposition raised in the argument, based upon the supposition that the contract with the libelant was entered into at Malden, in Canada West, and consequently constituted no lien on the vessel. The intervening claimant negotiated with the prior owners of the vessel, in March, 1852, at Malden, for the controlling interest in the same, while the vessel was moored in that foreign port, but the bargain was perfected at Detroit. And there is no proof, that the antecedent contract with the libelant was originally made in Canada, and such a fact will not be inferred in contradiction to the admission of the answer, from the circumstance of the vessel being temporarily at Malden, a foreign port, it is true, but a port intervening between Detroit and Buffalo, and embraced within the coasting trade of the lakes as defined in the act of Congress. The jurisdiction of this court, in cases of admiralty, does not rest upon the statute of 1845, but upon the constitution of the United States, and is not limited to tide waters, but embraces the lakes and navigable rivers, through which commerce is carried on between different states, or with a foreign nation. At the time the constitution

was framed, but little was known as to the extent and character of the northwestern lakes, and in conferring admiralty and maritime jurisdiction upon the courts of the United States, it was technically understood to embrace only those waters characterized by the ebb and flow of the tide. But in 12 Howard, the *Propeller Genesee Chief v. Fitzhugh*, the Supreme Court of the United States have decided, that these lakes are, as great inland seas, embraced within the spirit of the constitution, and that the maritime jurisdiction of the federal courts as to them, does not depend upon the old common law technicality. Whether, then, the contract with the libellant, was made in Canada or not, a fact that does not appear, the vessel, being licensed under the statute of the United States, and enrolled as sailing from Detroit to Buffalo, and for years so engaged, is subject to the law governing maritime contracts, and the presumption is, that her officers and crew were duly engaged in her service in a domestic port.

On the pleadings, then, we hold that the libellant is entitled to the year's wages; that his salary as engineer commenced in the fall of 1851; that his wages constitute a lien on the vessel; and that the intervening claimant purchased the vessel, subject to such lien. By the testimony, he voluntarily left the vessel, being discharged on the 16th of September, 1852; he is therefore to receive his wages, up to that time; or—which amounts in calculation to the same thing—a year's wages, deducting two months and half, or about \$100. The only point, then, presented by the pleadings, on which there is a difference of opinion between the parties, is, as to the amount of salary for which the vessel was made liable to libellant. One of the former owners of the vessel, Theodore S. Park, swears that the contract with the libellant for the year 1851-2, was \$550; that it had been \$500 the year before, but the owners had raised it \$50 for the year 1851-2. In contradiction to this, Captain Langly testifies, that while he navigated the vessel, the libellant repeatedly stated his wages at \$500, and the clerk, Fitzhugh, in making out his bill at the time of his discharge, allowed him only \$500, and to which libellant made no exception at the time. This all may be so, and yet it does not contradict the testimony of the

4 DISTRICT COURT OF THE UNITED STATES.

The Schooner Merritt Hunt.

former owner, who may have raised his wages to the amount stated, without at the time apprising the libelant, and I am more inclined to rely on the statement of the old owner as to this fact, than the evidence of Captain Langly or the clerk.

Enter decree then as follows :

Nine months and a half, at the rate of \$550 per year,	\$435 41½
Credit by payments,	236 00
Decree for libelant, balance,	199 41½

JOB S. LUTHER, Libelant, A. A. SMALLEY, Intervening *v.*
SCHOONER MERRITT HUNT.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. An *ex parte* deposition, taken under the act of Congress, *de bene esse*, will not be received unless all the provisions of the act be strictly followed.
2. When the officer taking the deposition *ex parte*, did not certify that the witness was "cautioned" as well as "carefully examined and sworn," as provided by law, the deposition will not be received.

Barstow & Lockwood, for Smalley.

Hunt & Newberry, for respondent.

WILKINS, J.—When this case was called for hearing, the counsel for libelants, to sustain their case, offered to read certain *ex parte* depositions taken at Green Bay, Wisconsin. To this objection was raised, that the depositions were inadmissible, because the provisions of the act of Congress were not complied with.

That part of the judiciary act providing for the taking of *ex parte* depositions, has ever been construed strictly. The act requires, that the witnesses "shall be carefully examined and cautioned and sworn," &c. The act requires that the witness shall be *cautioned* as well as sworn. It does not appear from the cer-

The Schooner Brandywine.

tificate of the officer before whom the deposition was taken, that this was done.

The objection is sustained, and the deposition rejected. The cause will be continued, to allow the libelant to retake the deposition.

EMILY SAGEMAN, Intervening libelant v. THE SCHOONER
BRANDYWINE.

*District Court of the United States. District of Michigan. In
Admiralty.*

HON. ROSS WILKINS, JUDGE.

1. A female employed as cook on board of a vessel is a mariner, and is entitled to sue in the admiralty for her wages.

J. S. Newberry, for libelant.

Mr. Eldred, for respondent.

WILKINS, J.—This was a libel for seaman's wages promoted by Emily Sageman the cook of the vessel.

To entitle one to sue as a mariner, the services rendered must pertain to the business of navigation, and be such as are necessary, or tend to preserve the vessel, or take care of those navigating the vessel. A cook on board of a vessel has been held to be a mariner. It matters not whether the cook is a male or female. The libel must be sustained. And it is referred to the clerk to ascertain the amount due to the libelant.

6 DISTRICT COURT OF THE UNITED STATES.

The Steamboat London.

KIEF & LANG v. THE STEAMBOAT LONDON.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. The sixth section of the act of Congress of 1790 confers power on the judge or justice to issue summary process in the cases specified; and the court will not look beyond the certificate of such officer for the authority of the clerk to issue the process prescribed; but such certificate must show on its face that the commissioner had authority to act.
2. Two seamen, being discharged from the steamer London, at the port of Detroit, made oath before a United States commissioner, of the amount due them as wages, who certified the same to the district clerk; on which a summons was issued, directed to the master of the vessel, to show cause why proceedings should not be forthwith instituted against the vessel.
3. The principal objection to the process was, that the certificate upon which it was based did not state the residence of the district judge, or that he was absent from his residence in the city of Detroit, where the Admiralty Court was held. The certificate is not sufficient.

THE libelants were two seamen who served upon the steamboat London; who had been discharged at the port of Detroit.

They made application to the clerk of this court as a commissioner, for summons against the master of the vessel to show cause why admiralty process should not issue against the steamboat, under the summary provisions of the 6th section of the act of 1790. The clerk acting as commissioner, certified to the clerk, that sufficient cause of complaint existed, whereon to found admiralty process.

An attachment was then issued, placed in the hands of the marshal, and the steamboat was seized.

The claimants filed exceptions to the proceedings in seven allegations, which were argued at length.

Sidney D. Miller, for libelants.

Hunt & Newberry, for respondent.

The Steamboat London.

WILKINS, J.—A motion is made, on the part of the claimants of said vessel, to quash the writ issued in this case, and all subsequent proceedings, on seven distinct grounds set forth in the application.

The process was issued by the clerk of the District Court against the vessel, on the certificate of a commissioner of said court, stating that there existed sufficient cause of complaint, on behalf of complainants, on which to found admiralty process, under the summary provisions of the sixth section of the act of 1790 (first statute at large).

The first six exceptions taken, embrace objections to the regularity of the proceedings before the commissioner, the service of the summons, and the *sufficiency* of the case made before that officer, as the basis of the certificate.

Into these matters the court will not inquire. The statute clothes the judge or justice with power in the premises, and this court will not look beyond the certificate, as conferring authority on its clerk to issue the process.

But although the court will not look *beyond*, it will look *at* the certificate, in order to ascertain whether the exigency specified in the statute existed; or, in other words, whether there was a statutory authority for the process.

The object of the law is the speedy adjustment and recovery of seamen's wages, and at the same time prevent vexatious litigation. With this view, the statute provides, that "if the wages be not paid within a specified period, or any *dispute shall arise in regard thereto*, it shall be lawful for the *judge of the district* wherein the vessel is moored, to issue a summons for the master to appear before him, and show cause why proceedings should not be forthwith instituted against the vessel, according to the course of admiralty courts, for the recovery of the wages due." But the statute further provides, "that in case the residence of the judge of the district be more than three miles from the place, or he be absent from his place of residence, then, in *such case*, any state magistrate or United States commissioner may issue such summons, take temporary cognizance of the complaint, and *certify*, if the amount be not settled, the subject

The Pacific and Brig Fashion.

matter to the district clerk, as the foundation of process in behalf of the seamen."

Such certificate must be in compliance with the statute, or else it is no foundation for the action of the clerk. It must state the residence of the judge of the district, and if that be more than three miles from the place, or he is absent from his residence at the time the proceedings are instituted before the magistrate, the proceedings are regular.

As the certificate is the only paper placed of record in this court, as the basis of proceedings here, it must show on its face, that the state magistrate or the commissioner had authority to act.

Such is not the character of this certificate, and the writ is set aside, and the subsequent proceedings.

E. B. & S. WARD OWNERS OF THE STEAMBOAT PACIFIC v.
THE BRIG FASHION.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. In case of a collision, between a steamer and a sail vessel, in which the owners of the former libel the latter, the libelants must not only show fault in the sail vessel, but all precautionary measures, on their own part, to avoid the danger to which she was exposed.
2. When a collision is deemed inevitable, an injudicious order, given in the excitement and alarm of the moment, is not to be considered the *only cause*, even if deemed a fault, should the antecedent negligence and conduct of the one party have placed the other in a situation where there was no time for judicious action.
3. Where no fault can be found on either side, the collision will be deemed an inevitable accident.
4. Where a collision occurs from *inevitable accident*, without the negligence or fault of either party, *each should bear his own loss*.
5. Allegations in pleading are *admissions* by the pleader, and need no proof, unless denied and put in issue: and as against the pleader, will be taken as matter conceded.
6. A witness swearing that he *thought* a particular order was given, and to his *belief*

The Pacific and Brig Fashion.

that it was obeyed, is not contradicted by testimony positively averring that such an order was not given.

7. The testimony of a witness should not be rejected, because in a hurried conversation, immediately after the collision, he gave a different statement as to a particular fact, from that positively sworn to in court.
8. The protest of the captain and crew, made the morning after the collision, when admitted in evidence, may be considered as evidence corroborative of the testimony of the witnesses in court, when, as to *all* material facts, they correspond.
9. Doubtful words in a statute, if not scientific or technical, are to be interpreted according to their familiar use and acceptance. The phrase "*going off large*" is nautical, and signifies having the wind free on either tack.
10. Since the introduction of steam in the propulsion of vessels, the rule of navigation has been enlarged, and steamers are required to use all their power and care, under all circumstances, to keep clear of sailing vessels. The former can be controlled and guided by human skill; the latter are governed by the wind.
11. Every precaution must be taken by a steamer to avoid a collision with a sail vessel, and the timely slackening of her speed is a necessary precaution at night, when passing through a fleet of sail vessels anchored at the mouth of a river. Under such circumstances, a mere conformity with the rules of navigation will not excuse the steamer.
12. A rate of speed in steamers, which, under the circumstances, necessarily endangers the property of others, is unjustifiable, and makes the owners responsible for the consequences.

H. H. Emmons, G. V. N. Lothrop and J. S. Newberry, for libelants.

I. In the case of the *Woodrop Sims* (cited in Abbott on Shipping, 229), Lord Stowell stated *four* classes of collision in the English admiralty.

1st. Where the collision is without fault on either side, as by inevitable accident or *vis major*; there the loss is left where it fell.

2d. Where both parties are to blame, there the whole loss is put together and divided in equal moieties, each party bearing half. *Rogers v. The Brig Rival*, 9 Lord Ray. 28.

This is also the rule where there is actual fault, but it is *inscrutable*, that is, uncertain on which side it lies. *The Sciota*, Davies, 359.

3d. Where the fault is with the suffering party alone; in this case he must bear his own loss.

4th. Where the fault is with the other party alone; then the offending party must respond to the injured party in full damages.

10 DISTRICT COURT OF THE UNITED STATES.

The Pacific and Brig Fashion.

The first proposition as laid down, it will be observed, is a mere *dictum*, and is not necessarily law in our courts. On questions of jurisdiction and admiralty law, our courts are not bound by the English courts, but may go to the great sources of admiralty law to be found in the codes of the commercial states of Europe. See Ben. Ad. chap. 12, *Resume*. Such is the doctrine of the United States courts. *The Jefferson*, 10 Pet. ; *Waring v. Clarke*, 5 How. 441 ; *The Genesee Chief*, 12 How. 443.

The *first proposition* of Lord STOWELL we submit, is not law in this country.

(1) Because it has never been so adjudged in this country.

(2) By the laws of most of the maritime states of Europe, the loss was divided in case of inevitable accident. See Abb. on Ship. 229. Such was the law of Valin, Oleron, Hanseatic ordinance, Vinnius and Stypmann, and the French ordinance.

(3) Because one of the most accomplished and experienced of the American admiralty jurists has decided otherwise. *The Sciota*, Davies, 364, 365.

But in the case at bar we claim the brig Fashion to be solely in fault.

II. It is the duty of a steamer, all other things being equal, to port her helm, and go to the right, on meeting a vessel coming from the opposite direction. Story Bail. § 611.

III. Where either party has neglected any ordinary precaution, or varied from any right or duty, they are presumptively liable. 1 Conklin's Adm. 303 ; 10 Howard, 605 ; 10 Howard, 584.

(1) The showing a green light by the Fashion when on the larboard tack, was an ordinary—nay more, a statutory prescribed, precaution. Laws of Cong. 1847 ; 8 Law. Rep. 375.

(2) A sailing vessel meeting a steamer has a right to keep her course, and it is her duty to do so. Conk. Ad. Pr. 308, 309 ; 2 Hagg. 173.

Corollary First. The Fashion was on her larboard tack, not showing a green light ; she is therefore in fault.

Corollary Second. The Fashion changed her course and headed obliquely across the channel.

IV. The libelants may recover though some fault is attribu-

The Pacific and Brig Fashion.

table to them. 1 Green. Ev. § 282 a; *Butterfield v. Forrester*, 11 East. 60; *Bridge v. Gr. Junct. R. W. Co.*, 3 Meeson & W. 244; *Davies v. Mason*, 10 Mees. & W. 546; *Barrett v. Williamson*, 4 McLean, 291.

A. D. Fraser, James A. Van Dyke and William Gray, for respondents.

To entitle the libelants to recover, they must show negligence on the part of the respondents, and entire vigilance, and no negligence on their own. Abb. on Shipp. 501 (top paging); also, ditto, 606; 1 Crockton & Meeson (1832), 20; 38 E. C. L. 252.

The libelants must show fault on part of defendants. *The Atlantic & Ogdensburgh* (reported in this volume); Story on Bail. 609, note; 3 Kent, 231.

The speed of the Pacific was too great under the circumstances, and puts her officers in fault. 2 Wm. Robinson, 9; 2 do. 271; 3 Wm. Rob. 76; 2 Wm. Rob. 2, 202, 379, 426; 3 Wm. Rob. 288.

It is a mark of suspicion that the libelants did not offer their protest in evidence. 3 Wm. Robinson, 295; 2 Wm. Robinson, 318.

In conflict of testimony the presumption is that the respondents did their duty. 2 Rob. 245.

WILKINS, J.—This is a cause of collision between a steamer and a brig, at the mouth of the river Detroit. The libelants were the owners of the steamer Pacific, and exhibited in their bill the following allegations, viz: "That the said steamboat, of the burthen of 500 tons and over, on the 26th of May, 1853, sailed from the port of Detroit with a large load of passengers and a small cargo of merchandise, on a voyage to the port of Cleveland, in the state of Ohio: that, in the evening, when about a mile and three-quarters below the port of Malden, and about three-quarters of a mile below the Malden light-house, and near the mouth of the river, while running her usual track, and only at the rate of five miles an hour, because the night was dark, without a moon, and it thus being impossible to distinguish

12 DISTRICT COURT OF THE UNITED STATES.

The Pacific and Brig Fashion.

a vessel at more than about twice the length of the said steamboat distant; and, furthermore, because the master of the steamboat thus slowed the speed of the said steamboat, in order to pass a vessel about five or six hundred feet above the brig Fashion; the master being on watch and on the look out, despatched a small light ahead, and soon discovered a vessel approaching the steamer he commanded, dead ahead, and apparently about three hundred feet distant, which was but twice the length of the said steamboat: that as soon as he discovered the said brig Fashion thus approaching the steamer, he ordered his helm to be put "hard a-port," designing to pass to her right, and leave her on his larboard side: that the helm of the steamer was accordingly put "hard a-port," and so kept until the said steamboat had lapped her bow upon said vessel about twenty or thirty feet; and that when he perceived the Fashion was about to strike the steamer, he ordered his helm "hard a-starboard," in order to throw his stern off and avoid a collision, which was accordingly done, but the said brig struck the said steamboat with her bow about midships, carrying away the wheel-house, the kitchen and pantry, with its crockery and furniture, and also the wheel beams, deck frames, pillar block, and breaking the wheel of the said steamboat."

The libel further exhibits, that at the time the light of the Fashion was first seen, the steamer Pacific "carried a bright light at the top of her pilot-house, a red light on her larboard side front of the wheel-house, and a green light on her starboard side opposite the red; and that the said lights remained in their positions burning, when the brig struck the steamer, and that they could easily have been seen from the Fashion for a long time before, and in season for her to have avoided a collision."

It is further alleged in the libel, that "when the Fashion was first seen, she was so near the Canada shore, that the steamer could not safely pass between her and the shore: that when first discovered by the Pacific, she was sufficiently near for those on the steamer to see her exact course, and that her bow pointed from the Canada shore towards the middle of the river: that, when the Pacific was nearing her, and about to pass her on the right, instead of hugging the said shore, or putting her helm to

The Pacific and Brig Fashion.

larboard, as she was bound to do, or instead of keeping on her course, she omitted to do either, but put her helm to the starboard, and thereby throwing her bow out from the shore, across the track of the steamer, and by reason whereof the collision occurred: that the orders 'to starboard' were distinctly heard given on board of the brig, and that, in obedience thereto, she bore out from the shore across the track of the steamboat, until just as the bow of the brig was about to strike the steamer, when the order was given 'to port her helm and bear away,' which was too late to avoid the collision."

After thus succinctly narrating the circumstances attending, and the immediate cause producing the collision (which, as the libel was prepared and filed within four days after the events described, and when the facts were then fresh in the memory of the captain of the steamer and his crew, may be fairly considered as their view of the facts at the time), the libel proceeds to confirm this view of the transaction, by the recital of the admission of the captain of the brig, that his vessel was in fact starboarded, as thus represented; and that the collision was consequently occasioned by the carelessness and mismanagement of the captain and crew of the Fashion, in not putting her helm to the larboard, or otherwise continuing her course up the river on the Canada side of the channel.

The respondents deny that the collision was occasioned by the fault of the brig; but directly charge the same to the carelessness and mismanagement of the steamer, averring that it was occasioned by the steamer's attempting to cross the bows of the said brig, when she should have continued her course and gone to the starboard. They further deny, that the brig was pursuing a course upward near the Canada shore; and aver, that the brig, being on a voyage from the port of Buffalo to Chicago, entered the mouth of the river Detroit, from Lake Erie, about 8½ o'clock in the evening of the day when the collision occurred: that having by the compass brought the lighthouse to bear from their vessel north by east, they pursued a course up the river west of mid-channel, direct for the Bois Blanc lighthouse: that they continued such course without material variation: that on entering the mouth of the river, all their

14 DISTRICT COURT OF THE UNITED STATES.

The Pacific and Brig Fashion.

crew, ten in number, were summoned upon deck, and stationed at the braces and other suitable places, so as easily to manage the vessel in case of emergency: that she was staunch, strong, well manned and equipped: that she had a signal lamp burning and suspended over the pawl bits, visible to those approaching: that in addition thereto, a man with a large globe lamp was stationed forward of the railing: that when she was two and a half miles up the river, and a quarter of a mile from the light-house, and about half a mile from the Canada shore, her master, who was on the look out, discerned the light of the Pacific coming down the river about half a mile off: that both the lights of the steamer were then visible, and continued so, until she approached to within forty or fifty rods of the brig, when the larboard light disappeared and continued so until within twenty rods: that at this time she was from two to three points to the starboard of the said brig's bow, and was then pursuing a course which would have carried her some fifteen rods to the starboard, and prevented the collision: that there was an abundance of room then between the brig and the Canada shore, for the steamer to pass with entire freedom and safety, the river being about two miles wide in that locality; that the said steamer here suddenly changed her course, and her larboard light again appeared: that the Fashion was then sailing up the river at the rate of a mile and a half an hour, and on the same course with which she had entered, and that her course was not altered until a collision with the Pacific appeared inevitable, at which time her helm was ordered a-port to ease off the blow of the steamer: that within a minute after the re-appearance of the larboard light of the Pacific, she ran across the course of the brig, striking her larboard bow, carrying away her jib-boom, bowsprit, and breaking through her larboard bow: that the speed of the said steamer was, at the time, unchecked. The respondents, therefore, fully deny that the collision complained of, could have been avoided by the brig Fashion, but affirm that it was caused by the sudden and improper change made in the course of the steamer. They deny further, putting the helm of the brig to the starboard, and aver that she only changed her course at the time, in the direction

The Pacific and Brig Fashion.

and to the extent and for the purpose previously stated; and further affirm that no order *to starboard* was given by the master or any one on board said brig, and that no collision would have occurred, had the Pacific kept her course to the Canada shore, or stopped her engine when the danger first became apparent.

The issue of fact, thus presented by these allegations of the respective parties, comprehend, therefore, the affirmation of the libelants that the collision was caused by the unskillful starboarding of the Fashion, when the vessels approached each other; and the denial of the same by the respondents. But assuming the fact to be according to the statement of the libel, and that such an order was given and obeyed by the brig, it by no means exonerates the steamer from fault, and attaches responsibility to the respondents, unless the alleged consequence of such order was solely attributable to such alleged false movement of the brig. The libelants must show that their vessel performed the duty which devolved upon her under the existing circumstances, in adopting all precautionary measures to avoid the danger to which she was exposed. They are not only called upon to establish fault in the respondents, but to prove ordinary care and diligence on their own part. At the moment a collision is apprehended to be inevitable, an injudicious order, given in the excitement and alarm of the moment, is not to be considered as the only cause, even if deemed a fault, should the antecedent negligence and conduct of the one party have placed the other in a situation where there was no time for judicious action. 8 Law Rep. 275; 12 How. 461.

Hence the inquiry of the court embraces the consideration of other facts than those composing the issue specified in the libel and answer. The pleadings admitting a collision, the principal inquiry is, whether it was the result of inevitable accident, beyond the control of human care and skill, or, if not, which vessel was in fault; or, were both in such fault as would call for an equitable apportionment of the damages? It was clearly not an event caused by a sudden storm, or, any such *vis major* as caused the vessels to be driven against each other, and which human foresight could not have prevented. Yet, if there can be no

fault found by the testimony on either side, it will nevertheless be considered as an inevitable accident. The steamer was on her usual evening trip to Cleveland, Ohio, and the brig on her voyage to Chicago, had entered the mouth of the Detroit river, in the vicinage of which and within the range of a mile of the light-house, a fleet of fifty or sixty sail vessels, bound upward, were detained by unfavorable weather. In the language of Captain Shepherd, of "the Hope," "The vessels were so thick in the channel, and the night so dark, that it was a difficult matter for a steamer to steer safely through them, and required the greatest precaution."

The testimony, which is principally applicable to the other points involved, is not only voluminous, but greatly contradictory. This is necessarily incidental to all cases of this description. The witnesses, usually the crews of the colliding vessels, are not at all times the most reliable; and, viewing the leading incidents from different and ever varying positions, a correspondence in their testimony cannot always be expected. With much care and attention, I have laboriously examined and studied the facts in the case, and will not undertake to reconcile the marked discrepancy in the evidence. Certain prominent facts are free from all doubt, and on them mainly will the decision of this court depend. Other facts are left in uncertainty, by the witnesses on the one side contradicting each other on material points, widely differing in matters of judgment, as to time, place, distance, and the character of the night; and all of them, almost with one accord, positively affirming the leading fact in the controversy, which is flatly, and as positively denied by all the witnesses on the other side.

Before we proceed, however, to an examination of this testimony, it would be well to notice four very material facts, placed on the record of the case by the libel.

Allegations in pleading, are admissions by the pleader, and need no proof, unless denied and put in issue; and as against the pleader, will always be taken as matter conceded. These facts are:

1. The night of the collision was very dark, and so dark as to

The Pacific and Brig Fashion.

be impossible to distinguish objects at more than twice the distance of the Pacific.

2. The speed of the Pacific was slackened to five miles an hour, in order to pass a vessel about five or six hundred feet above the brig Fashion.

3. Captain Goodsell, of the steamer, first discovered the brig Fashion approaching the Pacific dead ahead, and at the time about 300 feet off.

4. That as soon as he discovered the Fashion, thus approaching his vessel and at this distance, 300 feet, he first ordered his helm "hard a-port," and kept her so, until she lapped her bow upon the brig about twenty or thirty feet; and then, perceiving that the Fashion was about to strike the steamer, he ordered his helm "hard a-starboard," in order to throw his stern off, which was done, and then the collision occurred.

I. The first proposition presented by the pleadings and the proofs is, was the collision the result of the fault, or the unskillful conduct of the officers and crew of the Fashion?

It is argued on the part of the libelants, that the Fashion, in her onward course up the river, closely hugged the Canada side of the channel: that she was on this course when first seen from the Pacific: that she continued on this course until nearly opposite to, although somewhat below, a house on the Canada shore designated as the Elliot House, and stated by Mr. Elliot to be "about sixty feet below the light-house." That the Pacific having a minute before slackened her speed, to avoid a collision with the vessels lying in front of the light-house, was slowly proceeding onward in mid-channel, when the Fashion, suddenly changing her course for the American side, recklessly crossed the track of the steamer, and by unskillfully putting her helm to the starboard, rendered a collision unavoidable. Such a state of facts, if sustained by proof of every precautionary measure taken by the steamer to pass in safety (would certainly fully exonerate the steamer), and render the respondents liable to the amount of the damage incurred.

Is such a view of the case maintained by the preponderance of the evidence? I think not. While no two of the crew of the Pacific agree as to the relative position of the Fashion to the

Hope and to the Canada side ; and Smith Holt, the wheelsman, locates the Hope "in mid-channel, tailing towards Canada;" while Noble, the clerk, says, "she seemed to be coming up the eastern shore, and did not alter her course until a minute before the collision;" while Elliot swears "that the point of collision was further off in the stream and near the middle of the channel;" while Goodsell states that he could not doubt as to the position of the vessel, and that her course was up the river on the Canada side, and about 250 feet from the shore ; and in cross-examination, invalidating the strength of this testimony, by swearing that the collision occurred half a mile below the island, and consequently locating the Hope at a greater distance from the Canada side, and the light-house, than the same is fixed by Shepherd and Dumont ; while such glaring discrepancy weakens the position of the libelants in this respect, the captain, the two mates, the helmsman and seamen, numbering nine in all, and constituting the entire crew of the Fashion, clearly, unitedly and emphatically testify to her course from opposite Bar Point upward, west of mid-channel in a specified direct bearing for the light-house. And in this they are mainly supported by Wolf of the Walbridge, and Marshal Capron of the Blossom, the one following and the latter preceding the Fashion in the same course, and passing unobstructed up the stream to the light-house point, between the Hope and the so-called American side, shortly before the collision, the crash of which was heard distinctly on her decks.

If, then, taking the Canada side of the channel, and continuing in the same until the moment of collision, and putting the helm at that crisis to the starboard, thereby suddenly turning her bow to the left and across the river, is the fault of the Fashion, I cannot, from all the consideration I have given the evidence, so find that fact.

The libelants' witnesses by no means agree with each other as to hearing the order "to starboard," or from what quarter it proceeded ; and those of them who testify to such a fact, are positively contradicted by the captain and the entire crew of the Fashion, who must have heard such an order had the same been given, and must have been conversant of the fact had such an

The Pacific and Brig Fashion.

order been obeyed by the vessel. They could not be mistaken; while it is probable that those on board the steamer were so, hearing such a shout from the Walbridge, and from the appearance of the Fashion in "easing off her main sheet." If the fact was so, and such an order was given and obeyed, the captain, the mates, the helmsman, and the seamen of the Fashion have knowingly and corruptly sworn to a falsehood, material in this controversy, and which would require of this court, so believing the fact, to direct their recognizance to respond to a criminal accusation. Not so in regard to Goodsell, Fish, Dumont, Noble, and the wheelsman, Holt. There is a mental reservation, or a cautious modification in their testimony, which, however morally inexcusable if the fact was otherwise, would be protection of them on an indictment for perjury. Thinking such an order was given on board the Fashion, and believing the brig then swinging to the left, is not an oath contradictory to the fact, that no such order was given, and that no starboarding nautically considered ever occurred.

Captain Goodsell says, in his testimony in chief:—"I heard them on board the brig sing out starboard, and then 'hard starboard,' and saw the Fashion swing towards our vessel;" and in cross-examination, he says, "I think she put her helm to starboard, when we put our helm to port." All this may be consistent with the fact that the Fashion was not put to the starboard. Fish did not hear the order to starboard, but says, "the Fashion seemed to be swinging towards us, after Goodsell gave the order 'to port,' and then it was too late for either vessel to have avoided a collision;" corresponding with the statement of Kennedy Andrews, "that the Fashion, at the time, eased her main sheets," which would appear to those on the steamer, as if she was starboarding. Dumont says "that he heard the order 'to starboard,' but the Fashion was so close, that he couldn't say whether she swung or not." Noble says, "the Fashion seemed to be coming up on the Canada side; heard the order 'hard a-port' on the steamer, and observed an alteration in the course of the Fashion towards us, and immediately the collision occurred." And Holt says, "I think the Fashion luffed up just before the collision, and changed her course, heard the order 'to starboard,' but can't say the sound came from the Fashion."

All of which testimony amounts not to the weight of a spider's thread, when contrasted with the unequivocal denial of the fact by nine witnesses, who best knew of the circumstance, if it occurred, and still more so when taken in connection with the testimony of Wolf, that he, immediately before the collision, gave such an order on board of the Walbridge, whose position was directly astern of the Fashion. And were I to accept the equivocal affirmation of the libelant's witnesses on this point, thus explained by the order given on the Walbridge, and reject the positive and direct denial of the respondent's witnesses, I should give a preponderance to doubt over certainty, and establish a new rule of evidence for the discovery of truth.

I am obliged, therefore, to say, that my examination of the evidence, in regard to this very serious conflict between the witnesses, has led me irresistibly to the conclusion, that no such order was given on board the Fashion, and therein she was not in fault.

Heretofore I have considered the course and conduct of the Fashion, principally with the light shed thereon by the crew of the steamer. Their testimony certainly does not make out the case, as exhibited in the libel. Nor is much strength superadded thereto by Simonea and Guiteau; the latter of whom, by his conduct on the stand, did not commend his oath to the favorable regard of the court. We will presently consider the weight to which their evidence is entitled, with reference to the object for which it was offered.

During the recess of the day, when the libelants closed their testimony in chief, my mind was impressed with the conviction that they had not presented a case so free from doubt, as to warrant a decree in their favor. With that conviction, I was disposed to stop the further investigation; but, conceiving that the examination of the crew of the Fashion might lead either to an amicable adjustment by the parties, or to a decree on the basis that the real facts of the case were inscrutable, I permitted the hearing to proceed.

But the testimony of the respondents gives an entirely different view of the transaction, and, if worthy of credence, completely exonerates them from all liability, leaving only for the deter-

The Pacific and Brig Fashion.

mination of the court, the credibility of the witnesses who testify to the facts. It establishes that the brig Fashion was on the right course, as confirmed by Captain Willoughby, bearing from off Bar Point north by east, and heading for the light-house: that that course was kept without variation, except in passing the Walbridge, and the shoal which made out from the head of the Island: that she was properly manned: that she had a proper look-out: that she used extraordinary precautions to escape a collision with other vessels: that she added to the usual lights required by the law, the captain placing a man with a globe lamp outside of the railing: that, with the wind lightly freshening from the west, she crept up the stream at less than two miles an hour: that every man of her crew was at his post; and that she made no injudicious movement whatever, continuing on her course until colliding with the Pacific.

Such is the substance of the testimony of Captain McKee, corroborated in every important particular by Andrews, Salmon, Rogers, Flack, Mason, Sheely, and others.

How has it been impeached?

I must confess I place but little reliance upon the mathematical argument, or that which has been adduced to show the inconsistency of this testimony with natural truth. Such argument is based upon a misapprehension of the testimony as to the position of the other vessels; for displace the Hope a few rods further west or south, or farther from the light-house (localities about which all the witnesses for libelants greatly differ, and no two agree), locate the Deer further up or down, and change but a few feet the witness Elliot, and the whole argument as to the place of collision falls to the ground. It requires but a little variation in the lines drawn upon the chart to demonstrate this. Besides, if the witnesses locating these objects (no one of which can be safely considered as a fixed object but Elliot's house and the Island light), had satisfactorily agreed in relation to the same, which is not the case, it would only amount to the testimony of three witnesses hypothetically contradicting that of nine; for Capron and Wolf, in this respect, sustain the crew of the Fashion, who place the point of collision below the Hope, and

some thirty rods off, and the course of the Fashion at the time westward, or more towards the American side of the channel.

Neither can I accede to the opinion that, because Chart B, drawn by Mr. Campeau, represents a straight line from the point of starting, near Bar Point, to the light-house, and these witnesses testified to its accuracy, as representing the mouth of the river, and the course and position of the vessels in its vicinage, that, therefore, they swore to such a straight line as the course of the Fashion, which would consequently be inconsistent with keeping the light constantly in view over their larboard bow, when steering by the compass north by east. Their testimony was in substance, "that having fixed the compass, and taken the bearing north by east in starting up the river, their course was made direct for the light-house, sailing or heading direct for it, until coming near the shoals, when they sheered off a little to avoid them, resuming again their course by the light." In the language of the captain, "when the light bore north by east, we kept away, steering directly for the light." In pursuing this course, it is true, the Fashion would be continually nearing the eastern side of the channel as she advanced up the stream, because, as Captain Willoughby testified, "the Canada shore protrudes more westwardly, and the channel contracts as we approach the mouth of the river, and as the point of starting was more or less west of the light-house. And here I must say that a careful examination of the testimony has corrected the mistake under which I labored for a short time during the able argument of the counsel of the libelants; that, in this respect, the testimony of McKee and his crew was as to an impossibility and, therefore, so to be considered. But, on review, I find instead of "keeping the light bearing a little over the larboard bow," the testimony is, that they kept the position of the Fashion directly ahead for the light, as is fully and intelligently explained by Andrews, the first mate, saying:

"We kept away till we opened Bois Blanc light, a little on our larboard bow, and then, that is, after this, steered by the light and compass, the man at the wheel going by the light."

And Flack, the helmsman, swearing "that he kept his eye on the light, and kept it as right ahead as he could see."

The Pacific and Brig Fashion.

I was very careful in noting the testimony as given by McKee, Andrews, Flack and their companions, as to the course of the vessel, reading over repeatedly to them what I had written ere they closed their testimony, that I might not afterwards be misled; and I am satisfied their testimony is not obnoxious to the objection which has just been considered.

But, it is furthermore urged, that McKee should at least be discredited, because, as is charged in the libel, he stated on the following day, when he arrived in Detroit, "that his vessel was starboarded," and that such a statement differs from the testimony he has delivered in court.

That he told a different story on the occasion alluded to, is not so clearly established. The conversation he had with Mr. Thompson and others was a hurried one, just as he had landed, and when on his way to telegraph the owners; and it was an easy matter for them, under circumstances, to have misunderstood the purport of his language, or, for him unintentionally to have let fall a word that did not technically convey his meaning.

Thompson, Montgomery, Fish and McDonald decline testifying to his using the term starboard, while only Murray and Goodsell, of the eight that were present, swear positively that such was his language. Goodsell had preceded him to Detroit, and given his version of the transaction, and yet the same remarkable want of coincidence between this witness and the first mate, Fish, which distinguished their testimony as to the relative position of the vessels, and their conduct at the period of collision, characterizes their testimony as to the strong point of this conversation. Goodsell swears positively that he said "he gave the order and starboarded his vessel," while Fish "will not be so positive about the word starboard being uttered," but, that he said "he thought that the Pacific would go between him and the Canada shore, and that he headed a little for the American shore, and gave her a wide berth on the Canada side;" which is not materially variant from McKee's testimony on the stand. The witness Thompson, however, places this matter of impeachment, I have no doubt, in its true light, as it occurred; and giving to his version its proper weight, it would not justify the entire rejection of McKee's testimony, on the ground taken by

the libelants. With the change of one word, his narration of the transaction to Mr. Thompson, is but an epitome of his testimony in court, as I have recorded the same. He said to Thompson, "he saw the Pacific descending the river, he watched her to see her course, she seemed to change some as she approached, shutting out and opening, her lights:" from all of which he, McKee, concluded she was going to take the Canada side, and he, willing to give her a wide berth, "put to the American shore."

But, that he told another story, is successfully rebutted by the protest, which, if not competent evidence as to any fact it contains, is at least evidence, that he and his whole crew, the morning after this conversation on the dock, entertained the same opinions, and narrated succinctly the same facts, to which they have testified in court; and so far raises the probability that the witnesses thus impeaching the memory or integrity of McKee, were clearly mistaken as to his meaning, if not as to his language. Where a witness is sought to be impeached in this manner, by a number of others, it would be more satisfactory if those others could agree among themselves, or, that the memory of each had caught and retained at least the convicting word of the reported conversation.

Moreover, the rejection of his testimony would in this case amount to nothing; it would not weaken the preponderance, as the same facts are testified to by Andrews, Sheely, Flack and the others; and if McKee has sworn falsely, they all have sworn falsely; and not only so, but their moral turpitude is magnified beyond the one offence of perjury, to a corrupt combination deliberately to swear, by whole cloth manufacture, to a tissue of falsehoods, to the injury of the libelants—a supposition too monstrous for judicial confidence. McKee might have a motive, in self protection, as between him and the others; but it is hard to imagine how his crew could be brought to such a stage of crime, without the appliance of the usual incentives to human action. The intelligent, demonstrative and conclusive evidence of Kennedy Andrews, was in all particulars corroborative of McKee; and Flack, the helmsman, was as direct as to the same facts as either; and my confidence in both of them, as witnesses,

The Pacific and Brig Fashion.

has not been impaired. The great point of controversy, in the impeachment of Captain McKee, is as to the course he ran, and the necessity he was under to order his helm a-starboard. If he was on the Canada shore, such necessity may be conceived possible; but if, on the other hand, he was on the American side of mid-channel, such an order would only tend to put his vessel unnecessarily more in that direction. Now, that McKee is right, is confirmed by a portion of the testimony of the libelants.

Let a line be drawn through the river, from the starting place off Bar Point upwards, equi-distant from both sides of the channel. Call the same mid-channel.

Now, according to the testimony of Noble and Smith Holt, the wheelsman, the Hope lay in mid-channel, tailing, or with her stern towards the Canada side: Noble saying, "the Hope lay in mid-channel, and as we rounded her, we left her on our starboard side." The bow of the Hope, then, would of course be pointed to the American side. But Shepherd says, "that the Pacific, in passing, rounded the Hope." In doing so, her stern would of course tail or turn several points to the Canada shore, and consequently her bowsprit across mid-channel, would directly point down the river westward, towards the American shore. But Fish swears that the collision took place thirty-five or forty rods below the Hope; and Goodsell, that the Fashion was dead ahead, and consequently that distance in a line, drawn from and along her bow westward, places beyond controversy, according to the testimony of these four witnesses of the libelants, the point of collision on the American side of the channel; and therefore sustains McKee in the testimony he has given.

Thus disposing of this branch of the case, we are called upon to decide a two-fold objection which arises from the testimony of the respondents, viz:

1. That the Fashion being on her larboard tack, as is contended, she did not display the signal light as required by the 5th section of the act of Congress of 1849.

2. That the ignorance of Captain McKee, as to the new regulations in regard to navigation by steamers, exhibits such a

want of seamanship, as to prove that the Fashion was not well manned.

Apart from the consideration that the display of an erroneous light, is not made, either by the libel or the evidence, the cause of the collision, I am by no means satisfied that this objection is well taken under the provision of the statute.

The language of the 5th section of the act of 1849, is as follows: "During the night, vessels on the starboard tack shall show a red light; vessels on the larboard tack, a green light; and vessels going off large, or before the wind, or at anchor, a white light."

It would seem from the use of the conjunction "or," in the last branch of the sentence, that legislation designed to contradicting "going off large" from sailing "before the wind," and to direct the display of the white light under three contingencies. If so, the phrase, "before the wind," cannot be considered as definatory of "going off large." What then was meant by the latter contingency?

Doubtful words in a statute, if not scientific or technical, are to be interpreted according to their familiar acceptance. But the words here are all technical, and have a nautical meaning in the science of navigation, with which, in the interpretation of a statute, it is presumed courts of justice are acquainted. No experts need be called on to interpret the law. Many terms and phrases are used in our law books, and reports in admiralty, that are not in common use out of that jurisdiction. Booms, and pawl bits, and cat heads, and braces, and aft, and abaft, and larboard, and starboard occupy a prominence in admiralty, and are all, in legal supposition, at least, known to the court. So in regard to the phrase under consideration; its definition is the interpretation of the statute.

Congress designed to provide three signal lights, for five contingencies, and "going off large," and being "before the wind," and "at anchor" in the river, of a dark night, presenting a similar peril to approaching vessels ahead, have assigned them the same signal light as a warning. "Going off large" is having the wind free on either tack, properly termed a vessel "off large," because it is in her power to take a course to either side

The Pacific and Brig Fashion.

—starboard or larboard—proceed straight forward on her course, or return back to her anchorage, or to the point from which she started. In other language, she is free to the wind. She is not bound, but like a discharged debtor under the old insolvent system, who being at large, is at liberty to leave, as a free man, his prison bounds, and go whithersoever he will.

Was such the condition of the Fashion? McKee testifies, "that the wind on entering the river was W. S. W.; that at first it was very light, and scarcely sufficient to take them up the river, and that he had everything arranged to let go her anchor. But it soon blew a little stronger, and kept us moving slowly on our course." And Fish and Dumont both say, that when they first discovered her, "they could not tell whether she was at anchor or not." And Andrews says, "that they had aboard her larboard tacks;" and he and his companions, all testify, that the course of the brig was direct, without any change of helm or sails, and free to the breeze. Moreover, McKee swears, "that he had the regular signal light burning on the 'pawl bit,'" which, being the white light, and taken in connection with the evidence already quoted, shows that she was "going off large," with the wind on her larboard.

Being, then, a vessel "off large," on a larboard tack, or, to use the phrase of Judge Nelson, in 10 Howard, "having on board her larboard tacks," she was not in fault in displaying, in such a contingency, her white light from the pawl bit.

2. Neither can the second objection, as to the brig not being well manned, be considered as of any force, unless the catastrophe can be fairly attributed to the ignorance of Captain McKee of the rules and regulations adopted by the board of inspectors, under the 29th section of the act of 1852. The act itself, in its various provisions, is only applicable to vessels propelled in whole or in part by steam; and no special provision is made for promulgating these "rules and regulations" to be observed by steamers, beyond "furnishing to each steamer two printed copies, to be kept in conspicuous places." The law did not go into operation, except as to the appointment and qualification of inspectors, and the licensing of pilots and engineers, until the 15th of January last; and there being no proof of these regulations

being promulgated until after the opening of spring navigation, the notice of the existence of such new rules, and, therefore, the knowledge of the consequent change as to lights, was limited to steam vessels. Excepting the application of the old maxim, that ignorance of the law is no excuse, it is not easily apprehended, how the ignorance of the captain of the brig as to these regulations, can be seriously deemed bad seamanship. Besides, he made no movement whatever founded upon his belief that the old regulations were still in force. He, his two mates, and his helmsman, swear, that they fixed their course and took their heading near two miles below, and kept it, without deviation, until the collision.

Such, then, being the preponderance of the testimony, I am constrained to determine, that I find no fault in the Fashion; because I find no material discrepancy in the evidence sustaining the defence—but much difference, both as to fact and opinion, between the witnesses called to sustain the libel. Neither am I able to say that McKee and his crew were mistaken or deceived as to the course and movements of the brig; but, on the other hand, if that to which they have testified be untrue, in the main or in any important particular, I must declare they are guilty of willful and corrupt perjury, and should not be permitted to escape with impunity.

Our next inquiry is, whether or not the collision occurred in consequence of, or can properly be attributable to the negligence or misconduct of the steamer Pacific. And this inquiry is necessary, in order to determine the question of inevitable accident.

The rule is well settled in cases of this description, that the libelants must not only show that the collision was occasioned by the fault of the opposite party, but also, that ordinary care and diligence were used on their own part to avoid A. its failure in either respect will dismiss the libel.

The law imposes the burden of proof on them, with one single exception; and that is where the libelants establish misconduct or negligence on the part of the respondent's vessel, the burden of proof is partially shifted, requiring them to show that such fault

The Pacific and Brig Fashion.

did not cause the collision. As is observed by Mr. Justice Nelson, in *Newton v. Stebbins*, 10 Howard, 605.

"If every proper precautionary measure was carefully and timely taken by the steamer to pass the sloop Hamlet in safety, and the accident happened solely in consequence of the mismanagement and unskillfulness of the officer in charge of that vessel; then the damage can only be attributed to his own inattention and want of skill, and not to the steamer." Otherwise, if the steamer was in fault. *Vide*, as to similar ruling, *Clapp v. Young*, 3 Law Reports, 3; and 5 How. 465.

In this last case, Mr. Justice WAYNE, by whom the opinion of the Supreme Court was delivered, emphatically observes that:

"In cases of collision, where the one vessel is clearly proved to have neglected a duty imposed by law, she will be held responsible for all losses, unless it also appears that the collision was not caused by such neglect."

Another rule has been likewise well settled in admiralty, both in England and in this country, and that is, "That a vessel having the wind free is obliged to get out of the way of a vessel close-hauled, and the burthen of proof is on the former to show the exercise of all care and skill to prevent a collision. *Vide* 3 Hag. 214; 2 Dodson, 33 and 86; 1 Conklin, 305; *St. John v. Paine et al.*, 10 How. 581.

Since the introduction and application of steam in the propulsion of vessels, this rule has been so construed and enlarged as to require from steamers the use of all their power, under all circumstances, to keep clear of sailing vessels, and for this reason, that their impetus being controlled by human skill, they are considered as vessels navigating with a fair wind, or (in the language of Judge Nelson, in 10 Howard), "going off large," and, therefore, bound to give way to sailing vessels beating to the windward on either tack. *Vide* the cases of *The Perth*, 3 Hag. 414; *The Shannon*, 2 Hag. 173; *The James Watt*, 2 Rob. 277; *The Birkenhead*, 3 Rob. 82. These four cases, taken from recent English Admiralty Reports, in their application, strongly illustrate the rule as to steamers. In the first, the steamer Perth ran foul of the libellant's brig, while she was running at the rate of twelve miles an hour, in a dense fog, and in a track

The Pacific and Brig Fashion.

frequented by coasters. The brig was not discovered until the steamer was close upon her. The order to port helm was immediately given, but no order to stop the engines. The only question with the court was, "had the steamer done all in her power to avoid the collision?" and it was held that, considering the fog, and that the track was frequented by coasters, she ought to have reduced her speed at least one-half, or to six miles an hour; and that such precaution was due to the safety of other vessels; the Trinity masters declaring that, from their own experience, a steamer could be stopped in a little more than her own length. Here, then, the fault was that of the steamer, in not slackening her speed one-half in passing through the fog, and also in neglecting to stop her engine on first discovering the brig.

In the second case, which is that of the Shannon, and was also the case of a steamer and a sail vessel, the court held, that although the Shannon made out a clear case of a compliance on her part with the rules of navigation, and proved that the sail vessel was navigating in violation of the same; yet, as the former received her impetus from steam, and discovered the latter ascending the river five miles off, she should have been then under her master's control, and was therefore bound to give way, and in not doing so, was at fault, and decreed to suffer the loss which had accrued; and this on the principle, that the steamer did not use all the necessary precaution.

The third case is that of the steamer James Watt, which collided with the schooner Perseverance, while the latter was ascending and the former descending the river on a dark night. The master of the Watt, being in doubt what course the schooner would take, put her helm to port when the collision occurred. It was held, that the Watt was bound, under the circumstances (stress being laid on the doubt of the captain as to what course the schooner was in), instead of porting his helm, to have slackened his speed, until the course and situation of the other vessel were discoverable, and then to have acted according to circumstances.

In the other case, that of Birkenhead, it was held, that although the watch on board were justified in an erroneous

The Pacific and Brig Fashion.

belief, occasioned by the darkness of the night, as to the character and position of the brig with which the Birkenhead collided; yet, that the proper precaution was not taken on board of the steamer, by reversing her engine in time, and keeping it so until the fact was ascertained, whether or not the brig could be passed on either side.

These cases, and others of a kindred character in the English admiralty, have been specially cited and recognized as law, and their principles adopted by the Supreme Court of the United States. 10 How. 584. The general rule is thereby established, that in all cases of collision between a sail vessel and a steamer, the latter will not be exonerated from liability, unless on proof that every precautionary measure was adopted by her to avoid a collision. And timely slackening the speed, is deemed a necessary precaution. A mere conformity to the rules of navigation will not excuse; neither can she under such circumstances, attach responsibility to the sail vessel, on showing her fault, in non-conformity to such rules, unless such fault and non-conformity, and not the steamer's want of the utmost care, was the sole cause of the accident.

Steamers invoke a power in navigation, highly advantageous to trade and commerce, but at the same time perilous to other vessels, unless managed with the greatest care, and the most constant vigilance. Greater than the winds, and not so capricious, this power is ever under the guidance of experience and skill; and in their greatest speed steamers can be almost instantly stopped, by stopping their engines, or their course, "though they be so great, easily turned about, with a very small helm, whithersoever the governor listeth."

The law, therefore, in tender regard to human life and property, will not sanction the use of this power, however convenient to the public, to the destruction of the rights and interests of others.

In *St. John v. Paine*, 10 How., Judge NELSON, in delivering the opinion of the Supreme Court, and approvingly citing the *Perth* and the *Shannon*, declares:

"The obligation of steamers to avoid a collision, extends further than sail vessels, because they possess a power not be-

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longing to the latter, even with a fair wind, the captain having the steamer ever under his command, both by altering the helm, and by stopping the engines." "Greater caution and vigilance, therefore, will be exacted of them, and, as a general rule, when meeting a sail vessel, whether close-hauled or with a free wind, the steamer must adopt such precautions as will avoid collision."

The rule is imperative. The steamer must do all in her power. Any omission of a duty, under the exigency, will make her owners liable for the consequences.

In *Newton v. Stebbins*, 10 How. 606, the same judge, announcing the opinion of the court, again declares :

"The steamer was greatly to blame in not having slackened her speed (she then running from eight to ten miles an hour), as she approached the fleet of river craft. It is manifest to common sense, says the Supreme Court, that this rate of speed, under such circumstances, exposed the other vessels to unreasonable and unnecessary peril, and we adopt the remark of the court in the case of *The Rose* (2 W. Rob. 3) : "That it may be a matter of convenience that steamers should proceed with great rapidity, but they will not be justified in such rapidity; to the injury of others." And in the case of *Genesee Chief*, 12 How. 563, Chief Justice TANEY observes :

"A steamer having the command of her own course and her own speed, it is her duty to pass an approaching vessel at such distance, as to avoid all danger where she has room ; and if the water is narrow, her speed should be so checked, as to accomplish the same purpose." The Supreme Court of the United States, then, have gone to the fullest extent of the English authorities, and in adopting the language of the court in the "*Rose*," have also adopted the principle which governed that case, viz : that a rate of speed in steamers, which under the circumstances, necessarily endangers the property of others, is unjustifiable, and makes the owners responsible for the consequences.

In the case of the "*Rose*," the night was dark and hazy, she had her lights burning, the sail vessel had none, and no vessel could be discerned at a greater distance than a quarter of a mile ; and at the time of the collision the steamer was running at the rate of ten or eleven miles an hour ; under such circumstances,

and based upon the speed of the *Rose*, was the remark made by the court, as approvingly cited in *Newton v. Stebbins*. Time, place and circumstances, therefore, are all to be carefully considered and weighed, in the formation of a judgment as to what would constitute a legitimate speed in case of a collision. It would vary under different vicissitudes. Full speed would not be improper in an open lake, with a wide berth in daylight, or in navigating a river clear to observation and free from obstruction; while, on the other hand the greatest caution and the utmost care are essentially requisite at night, on a narrow channel, frequented by other vessels, and especially where a number are known to be anchored, or detained by stress of weather. Under such circumstances, a steamer is obligated by the law, either to stop her engine, in order to ascertain her course, or, slowly to feel her way, under no greater power of steam than that which is barely necessary for steerage purposes; and any greater rate, even where the peril is imminent, and has been foreseen, would be unjustifiable.

Moreover, in the last case cited, that of the *Genesee Chief*, the Supreme Court has established a rule, that must govern in all such cases. It presents a simple alternative to steamers in meeting sail vessels, by declaring, that they must "pass approaching vessels at a safe distance if possible; or, if not possible, they must stop their further progress until the difficulty be obviated."

Such a rule, then, being authoritatively given by our highest judicial tribunal, our duty is to apply it to the facts of this case; and in doing so, a two-fold inquiry is presented, which we will briefly discuss:

1st. Was the speed of the *Pacific*, at the time and under the circumstances of the collision, such as to amount to a fault occasioning the accident?

2d. Was there space for her to have passed on the Canada or American side of the channel, and thereby have avoided the *Fashion*?

Were it not for the great discrepancy in the testimony of the officers and crew of the *Pacific*, as to the question of speed, the court would have very little difficulty in fixing the fact. For their testimony on that point, especially that of the engineer

Hickey, is more reliable than the testimony of the other witnesses, who were not on board of the steamer. With all of them, except the engineer, it would be but a matter of opinion, and with him, it is knowledge derived from experience and observation of his machinery and the revolutions of his wheels. The libel fixes the speed at five miles an hour, and no doubt the proctor in drawing his bill, obtained this fact from that source; then fresh in the recollection of the party. The testimony adduced on the part of the libelants, varies from four to seven miles; while that of the respondents runs up from seven to fifteen miles an hour. Shepherd stood on the brig Hope, and noticed the vessels passing, and thinks the speed of the steamer between six and seven miles; but I am of opinion that the satisfactory preponderance, is with the officers of the steamer, who should be best conversant of the fact, and better qualified to form a right judgment, while one of them could know the fact, if he thought proper to have directed his attention at the time to the subject.

There can be no doubt, that until she was abreast of the Virago, her speed was as usual, about fifteen miles an hour; and that then, for the first time, observing the peril to which she was exposed, she checked her speed, and, in the intervening space between that vessel and the Hope (they being a quarter of a mile apart), the steamer was carefully worked by hand; and "hooked on" again as she rounded the Hope, and not a minute before the accident.

Her speed, therefore, between the Virago and the point of collision, becomes the important question. Anterior to this, there could be no fault in her full speed, as it endangered not the property of others; and she was not obligated to check or change until the necessity was apparent, when, abreast of the Virago, the captain and the mate first discovered their vicinage to the fleet of sail vessels, and observed the brig ascending half a mile off.

Our attention, therefore, is limited to the testimony as to her speed in that space.

Captain Goodsell swears:

"On passing the Virago, we checked our speed, by backing and reversing the engine; and at the time of the collision, the

The Pacific and Brig Fashion.

Pacific was passing the land at the rate of four or five miles an hour, the current being there four miles an hour."

Gooley, the captain of the Virago, swears:

"That he heard the bell ring to stop the engine, when the Pacific passed the Virago."

Hickey, the engineer, on whom I most rely, swears:

"Between the Virago and the Hope, the steamer was passing the land at the rate of five miles an hour, with a current of four miles. Her speed had been checked a few minutes before the collision took place. The engine was stopped and backed, and I worked her very slow by hand, with no greater motion than a good steerage way, making but seven or eight revolutions of the wheel. Before she was checked, she was running at the rate of fourteen or fifteen miles an hour. 'Hooked on,' just before the crash, and stopped the engine at the same time. Her speed but one mile an hour."

Fish, the mate who had the temporary command, swears:

"When we got near the Virago, I ordered the engine reversed and backed, almost stopping her headway; and her speed did not exceed four miles an hour from that time till the collision," including the current.

Dumont, second mate, swears:

"On nearing the Virago, we reversed our engine, and slackened our speed from three to five revolutions, and continued so until the collision. Passing the land at four miles an hour, and about a mile an hour was sufficient steerage way."

Considering the official position occupied by these witnesses, the one captain, who ought to know; his two mates, who had every opportunity of knowing; and the engineer, whose especial function was to direct the machinery, so as to attain with safety a certain power as to speed, all of whom had ability and experience to form a correct judgment, and all concurring that the speed did not exceed, including the current, five miles an hour; and the fact is satisfactorily settled, that her impetus at the time did not exceed more than what was necessary for steerage purposes. For if the current was four miles, some motion of the machinery was necessary, to enable the wheelsman to guide the

ship, and move her through the perils by which she was surrounded.

All agree that the night was dark—no moon or starlight—and objects but dimly discerned at a few rods' distance. Her duty then was to move cautiously, not to return, but to feel her way in her downward progress, and without absolutely anchoring in the stream. She must exercise some power to enable her to avoid a collision. I do not question the integrity of these witnesses, and I confide in their ability to give a reliable estimate as to this very important point. Had the testimony been otherwise, had the speed exceeded that which was merely necessary as steerage power, had her officers neglected the precaution of reversing her engine and stopping her headway, when off the *Virago*, and when they were first apprised of the peril ahead, the steamer would have been grossly in fault, and under no pretence could claim the protection of this court.

The next question is, whether there was room for her to have passed on either side of the *Hope*.

Here there is great discrepancy in the testimony. While the crew of the *Fashion* testify positively that there was such an open space on the Canada side, and there is no doubt but what other steamers passed both, shortly before and shortly after the collision, and while the *Blossom* reached the light-house on the American channel; yet Goodsell and Fish, with whom the responsibility of navigating the steamer rested, testify that the latter channel was blocked up, and that although there was an open space on the Canada side, yet there was danger of running aground. From this discrepancy, as to this point, I am not able to declare the course of the steamer a fault. How much soever we know the fact now, yet, at the time, either passage seemed hazardous to the officers of the steamer. I am of opinion, therefore, that the collision was an inevitable accident, resulting from the darkness of the night, and is not attributable to the fault of either party. Both, from the preponderance of the testimony, did all in their power, all that was called for under the circumstances; both vessels were properly manned and skillfully managed, and both used every precaution that could be used under the circumstances to escape the catastrophe which occurred.

The Propeller Napoleon.

Under such circumstances, the settled rule in the United States is the rule of the admiralty in England, and not the rule which prevails among the maritime states of the continent of Europe. That rule has not merely been cited and recognized by the Supreme Court of the United States, as by WOODBURY, Justice, in *Waring v. Clark*, but expressly adopted and directly applied. *Vide* 1 Howard's Reports, 28 and 30; 5 Howard, 503, and 14 Howard, 538.

In the last case, that of *Stairback v. Rae*, after citing the English and the two preceding American cases, and the continental rule, Judge NELSON, who delivered the unanimous opinion of the Supreme Court, says as follows:

"We think it more just and equitable, and more consistent with sound principles, that where the loss happens from a collision which is the result of inevitable accident, without the negligence or fault of either party, that each should bear his own loss.

"There seems no good reason for charging one of the vessels with a share of a loss resulting from a common calamity beyond that happening to herself, when she is without fault, and therefore, in no just sense, is responsible for it."

This reverses the New England decision, and the libel, therefore, must be dismissed, with costs.

GEORGE B. PEASE *v.* THE PROPELLER NAPOLEON.

District Court of the United States. District of Michigan. In Admiralty.

HON. BOSS WILKINS, JUDGE.

1. Where a party, applying to a court of admiralty to set aside a sale, is guilty of inexcusable laches in making his application, the motion will not be granted.
2. As to whether there are circumstances or not, under which the court would set aside a regular sale in admiralty. *Quere?*

The Propeller Napoleon.

3. Where the party applying to set aside a sale, knew of the institution of the suit before sale, knew of the sale within two weeks after it took place, and yet delayed making his application for nearly six months, his laches is inexcusable.

THE propeller Napoleon had been libeled in admiralty, and a decree made in favor of the libellant, and for a sale of the vessel. A writ of *venditioni exponas* had been issued, and the vessel duly advertised and sold, the proceeds paid into court, and an order of distribution made. Subsequently, L. M. Dickens, claiming an interest in the vessel as mortgagee, appears in court, and moves that the sale of the said propeller be set aside.

Hovey K. Clark, for Dickens.

1st. All courts have power over their own process, to prevent its becoming the instrument of fraud. Act of Congress, 1793, section 7; Admiralty Rules, 46; 12 Peters, 472, 475, ——— v. *City of Lafayette*.

2d. Whenever there is fraud actual or constructive in the sale of property under the process of a court, it will interfere to right the wrong. 1 Story's Eq. Juris. §§ 187, 262; 1 Clarke Rep. 101, and 475; 13 Wend. 224; 3 John Ch. R. 424; 2 Paige, 339; 1 Green Ch. R. 214, 216; 26 Wend. 142.

3d. If any of these causes exist for setting aside a sale, the order will be granted, unless the party resisting shall show himself to be a *bona fide* purchaser without notice of prior equities. 2 Leading Eq. Cases, part 1, p. 79; 8 Wheat. 421.

James V. Campbell, for respondent.

1st. No judicial sale will be set aside for mere inadequacy of price.

2d. No sale will be set aside after confirmation unless under very extraordinary circumstances, and most of the authorities deny that it can be done at all.

3d. That an adult cannot have a sale set aside unless there has been a fraud committed by the purchaser or master, or some surprise created by the purchaser, or master, whereby he was prevented from attending and bidding at the sale.

4th. That a sale will never be opened where third parties have

The Propeller Napoleon.

obtained rights. *Gardner v. Schermerhorn*, 1 Clark's Ch. R. 101; *Williamson v. Dale*, 2 John. Ch. R. 290; *Livingston v. Byrne*, 11 John. R. 566; *Requa v. Rea*, 2 Paige's Ch. R. 339; *Lansing v. Mackpherson*, 3 John. Ch. R. 424; *Tripp v. Cook*, 26 Wend. 143; *Aubrey v. Denny*, 2 Molloy, 508.

If Mr. Dickens had made out a fraud of the worst kind, he could not obtain relief against any one.

1. Because of lapse of time. 2. Because of want of interest. Admiralty Rule, 40; *The Avery*, 2 Gallison, 386; *Steamboat New England*, 3 Sumner, 495; *Hudson v. Questen*, 7 Cranch, 1; *Broweler v. McAuthur*, 7 Wheat. 58; 4 Kent Com. 138, and cases cited; *Tannahill v. Tuttle*, Mich. Sup. Ct. 1854.

WILKINS, J.—The complainant filed his libel in May, 1853, for the recovery of a debt due by the propeller, and proceeded with the cause to a decree of condemnation and sale. After publication regularly made in the state paper pursuant to the order of the court, daily for twenty days, she was sold by the marshal on the 24th of August, 1853.

An intervening libel by Grant and Barron as mortgagees, was presented and filed the 27th of June, 1853, claiming a sum exceeding \$1,800.

Another intervening libel was presented and filed October 1st, 1853, for the balance of the proceeds then in the registry, and a decree obtained favorable to the claimant on the 26th October, 1853.

Report of sale was made by the marshal on the 5th of September preceding, with confirmation and the distribution of the proceeds in liquidation of the original claim and the costs which had been incurred.

These incidents in the progress of the case, with the dates of their occurrence, are all important in the determination of the motion under consideration to set aside the sale.

On the 10th of March, 1854, more than six months after the sale by the marshal, and nearly the same lapse of time after the decree of distribution, Lewis M. Dickens presents his affidavit, exhibiting the following facts, on which he seeks the intervention of the court.

The Propeller Napoleon.

He shows that on the 15th of October, 1852, the propeller Napoleon was jointly owned by John R. Livingston and Sheldon McKnight, the latter being the owner of one-third : that the said Livingston being indebted to the said Dickens in the sum of \$1,500, mortgaged at that time his interest in the vessel to the affiant, conditioned for the payment of the said debt on the 1st of November, 1853, which was duly recorded in the office of the collector of the district of Mackinaw : that McKnight, by an agreement in writing, in which he expressly assumed to pay the debt specified to the affiant, purchased from the said Livingston in June, 1853, his two-thirds interest in the vessel, and that the said Livingston, at the same time, executed to him a bill of sale for the same : that McKnight personally attended the marshal's sale, and procured a bid for \$250 in the name of Henry N. Walker : that the notice of sale, published in the Free Press, was obscure, and not calculated to attract attention : that the affiant, although aware of the libel proceedings on the part of the complainant, yet had not the remotest expectation that a sale of the vessel would be permitted : that he had no notice of the sale until the 16th of September, 1853, twenty-two days subsequent thereto, and thirty days antecedent to the decree in favor of Cole's intervening libel for a distributive share of the proceeds of the sale.

Without intimating an opinion whether or not, or under what circumstances, this court would set aside a regular sale in admiralty, on the application of a third party interested in the vessel, I am clearly of opinion that the facts disclosed in this affidavit, would not warrant such interference. Was there a case of fraudulent collusion between McKnight and the complainant as to the institution of the original proceedings and their prosecution to the sale of the vessel, made apparent, or any ground laid to suppose such ? Could a reasonable inference be drawn, that Mr. Walker in the purchase of the Grant & Barron mortgage on the 15th of July, 1853, acted as the trustee of McKnight, and also bore that relation as a bidder at the sale ; or that Sheldon and Douglass were not *bona fide* purchasers, this court might possibly interfere. Yet, all these facts should have

The Pacific and The Fashion.

been brought to the notice of the court, at an earlier period; and it was certainly in the power of the affiant, by appropriate application, to have obtained from the court a record recognition of the existence of his mortgage prior to the sale, and an order that the same should be subject thereto. And at the October term after the sale, he should have moved to set it aside.

His laches in the matter is inexcusable. He knew of the institution of the suit in time to intervene before sale, so that his interest might be protected. He knew of the sale within two weeks after it occurred and before its confirmation. Yet he permitted Mr. Whiting, as he alleges, to lull him into security by the advice, on which he acted, "to let the matter stand as it then was, and see how it would come out."

But, apart from all this, Walker's and Sheldon's affidavits are conclusive. The first, repudiating entirely any inference that he was the trustee of McKnight, and the second, showing the fairness of his purchase and the actual cash payment of more than \$8,000.

Moreover the affiant, by his own statement, is not remediless. He is able to prove the agreement of McKnight to pay this mortgage, and Mr. Walker swears as to his knowledge of McKnight's circumstances, and his present ability to respond to much more than that amount. Dickens lost his lien on the vessel by his own neglect.

Motion refused.

EBER B. & S. WARD, OWNERS OF STEAMBOAT PACIFIC v. THE
BRIG FASHION.

*District Court of the United States. District of Michigan. In
Admiralty.*

HON. ROSS WILKINS, JUDGE.

1. A decree in admiralty is the judgment of the court on the subject in controversy, submitted by the pleadings, and must correspond with, and apply to that issue.

The Pacific and The Fashion.

2. The opinion of the judge on collateral matters, not involved in the record, is not to be incorporated in the judgment of the court.
3. When a recovery in damages is sought in cases of collision between two vessels, and the proof exhibits faults in both, or no fault in either, and the libel is therefore dismissed, the decree need not set forth the ground assumed by the court, unless the pleadings presented such issue.
4. Especially will such course be avoided in framing the decree, if the court is apprised, that the same matter is litigated between the parties in another district.

THE opinion of the judge in deciding this case upon the merits, is fully reported on page 11 of this volume. After this suit had been commenced in this court, the owners of the brig Fashion filed their libel in the District Court of the United States, for the district of Ohio, against the steamboat Pacific. The steamer was seized, bonded, and the Wards as claimants appeared in the Ohio District Court, and filed their answer. The court in the decision above referred to, designated this collision as arising from inevitable accident, holding, that from the testimony presented, neither party was to blame.

The counsel for libelants wished to have those facts recited in, and made a part of the decree; in order that this judgment might be pleaded in the suit pending in the United States District Court, for the district of Ohio as *res adjudicata*,

Emmons, Lothrop & Newberry, for libelants.

Fraser, Vandyke & Gray, for respondents.

WILKINS, J.—In this case a motion was made in open court, by the proctors of the brig Fashion, that a decree be entered dismissing the libel with costs, according to the judgment of this court previously pronounced in the case.

After the court had pronounced its opinion, directing the libel to be dismissed with costs, and one of the proctors had notified the court of the intention of the libelants to appeal, the court was requested by the senior proctor for the libelants, to direct the clerk to suspend entering a decree, as the form of the same would be amicably agreed upon by the solicitors on both sides.

To this, Mr. Gray, the proctor of the respondents, assented.

The Pacific and The Fashion.

The court are now apprised that such agreement cannot be had, and are asked by the motion, to direct the decree to be entered as specified in the motion under consideration. This is resisted by the libelants, on the ground, that inasmuch as the court, in the opinion pronounced, declared, that from the evidence, no fault could be found in the management of the steamer Pacific, and that, therefore, the collision was the result of inevitable accident, that such conclusion should be incorporated in the decree to be entered of record.

Before proceeding to the trial, the court was informed that a suit had been instituted in the district of Ohio by the respondents, who had there libeled the steamer Pacific, which suit was still pending and undetermined. The form of the decree is deemed of importance, as the libelants here, desire, as defendants there, to arrest further proceedings, on the ground that all the matters in controversy have been adjudicated upon by this court, and determined here.

Such would be their right if such had been the case, in the litigation in this court, and the form of the decree would be of little consequence, if the pleadings exhibited the same. If to a libel, the plea of jurisdiction is alone set up in the answer, and on hearing, the libel be dismissed, the decree need not state, as the cause of the dismissal, the want of jurisdiction; for that sufficiently appears by the record of the case, the decree having reference to the issue. What is the decree but the judgment of the court, on the subject matter submitted—the judicial determination of the issue? It must correspond with, and apply to that issue.

So far as the opinion of the judge embraces collateral, or matters not involved in the issue, so far the opinion is but judicial reasoning, and illustration, and cannot and should not be made the basis of, or be incorporated in, the judgment. In the present cause the libel exhibited a case of collision between the brig Fashion and the steamer Pacific, and specified certain allegations upon which a recovery in damages was sought. They were these:

1st. The unskillful navigation of the brig Fashion, in star-

44 DISTRICT COURT OF THE UNITED STATES.

The Pacific and The Fashion.

boarding her helm, when she should have ported ; by reason whereof the collision occurred.

2d. The unseamanlike conduct of the officers and crew of the *Fashion*, in not pursuing her course up the river close to the Canada shore, but suddenly changing that course and crossing the track of the *Pacific* when it was too late for the latter to avoid a collision.

Thus was gross negligence and fault charged by the libel on the vessel of the respondents.

The answer denied both these averments, and alleged that the course of the *Fashion* was on the American side of the channel, and that she was not starboarded, and did not cross the track of the steamer.

The evidence was not strictly confined to this issue ; other matters were embraced in the examination, and in the argument of the counsel. It was strenuously and ably urged upon the court, that if the evidence did not make out fault upon the part of the *Fashion*, yet there was no fault proved upon the part of the *Pacific*, and that consequently the damages should be apportioned between the colliding vessels. The court took the whole matter into consideration, and having determined that the preponderance of the testimony was with the respondents, so declared its conviction, and that on the issue presented, the libel must be dismissed, not being sustained. Here the opinion would have rested, and such was the intention of the court, and it is so declared. But the question of the apportionment of damages resting on the circumstances of the collision's being an inevitable accident, the court went further than the pleadings warranted, and having fully considered and analyzed the testimony in regard to that proposition, could not, from the testimony, come to any more satisfactory conclusion, than that stated at the close of the written opinion. The examination and consideration of the questions were due to the able counsel who presented the argument, but were not incorporated in the written opinion as forming the basis of the judgment of the court.

The language is emphatic, viz: "the libelants having failed to establish fault in the *Fashion*, the libel must of course be dismissed."

The Petrel and The Gore.

Although still of the opinion that the preponderance of the testimony as to the speed of the Pacific, the only point determined by the court, was that she had no more than the necessary steerage power under the circumstances, yet I cannot conscientiously so direct the form of the decree, as to preclude the respondents from recovering in their suit, by a prejudgment in this court, when the defence of casualty is not set up in their answer, and the point was not directly specified in the issue.

I more readily adopt this course, as the libelants have notified the court of their intention to appeal, which is allowed without cost, where the testimony can be more minutely examined with reference to this point, and where any error of judgment can and will be corrected by the circuit judge, and consequently where no damages, but the delay of a few months, can accrue to the libelants.

NOTE.—This cause was taken by appeal to the Circuit Court of the United States, but with the suit in the District Court of the United States, for district of Ohio, it was compromised.—EDITOR.

CHARLES DICKENSON, OWNER OF THE SCHOONER PETREL v.
THE STEAMBOAT GORE.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. The manner and demeanor of witnesses, in giving testimony, will be considered where they conflict in their statements.
2. In a case of collision between a steamer and a sail vessel the former is not to be presumed to be in fault merely because, as a steamer, she has control over her own movements.
3. Steamers are to be treated as sailing with a fair wind and bound to give way to a vessel close hauled.
4. Where a collision has occurred between a steamer and a sail vessel, and the evidence shows that the steamer was in her regular course and adopted all the

The Petrel and The Gore.

usual precautions to avoid the collision, the sail vessel having a fair wind, and the facts proved being inconsistent with the supposition of requisite care on the part of the vessel, the court will presume the latter to have been in fault.

THIS was a libel *in rem* for a collision, promoted by Charles Dickenson, owner of the scow Petrel, against the steamboat Gore. The libel alleges that in the month of October, 1853, the scow Petrel, a vessel of more than sixty tons burthen, enrolled and licensed for the coasting trade, &c., being in good condition, sailed from the port of Cleveland, Ohio, for the port of Detroit, Michigan: that while on the voyage, about 10 o'clock in the evening of the 3d of October, 1853, as the Petrel was sailing up the Detroit river, within a short distance of Detroit, with the wind up the river, and having a good white light, properly placed on her jib-boom, she was carelessly and negligently run into by a vessel which the steamboat Gore had in tow: that by reason thereof the foresail, mainmast, stanchions, bulwarks and rigging of the Petrel were damaged to the amount of one hundred and fifty dollars: that the collision was occasioned by the carelessness and negligence of the officers and men on the Gore; and that the Petrel, being in her proper channel, and having good lights displayed, was in no fault.

The answer of John Sloan, claimant and owner of the Gore, admits the collision, but denies that it was occasioned by carelessness on the part of the officers and men of the steamboat, and alleges that it was entirely the result of gross carelessness on the part of the men on the Petrel, stating the following facts in support of said allegations: That on the night in question the Gore left Detroit, on her way down the river, with the bark Pomona and the schooner White Squall in tow: that the night was clear: that the Gore had all her lights displayed and in good order: that the captain of the steamer was on deck with the captains of the vessels in tow: that they saw the Petrel coming up the river about three-quarters of a mile off, with a free wind: that when the Petrel was about half a mile distant, the captain of the steamer ordered her helm a-port: that the steamer was then close in towards the American shore, that being the shore usually taken by vessels descending the river: that the more the steamer ported her helm the more the Petrel put her helm to

The Petrel and The Gore.

starboard and continued to advance towards the steamer's centre light: that when the vessel was about four hundred yards off the captain of the steamer rang his bell and checked the steamer's headway: that the captain of the bark in tow called out from the steamer to the Petrel and asked her master which vessel he was going to run into, so that preparation might be made for him: that when the Petrel was yet three hundred yards off the steamer was backing and had hauled as far to port as it was safe to go: that the former still continued to approach the latter, until she came within a very few yards of her: that the Petrel then suddenly ported her helm, but only just in time to cause her to come in collision with the jib-boom of the bark which the steamer had in tow, whereby some comparatively trivial damage was occasioned to the Petrel.

Alfred Russell, for the libellant.

George V. N. Lothrop, for the claimant.

WILKINS, J.—The suit was brought to recover the damages occasioned to the libellant, the owner of the scow Petrel, which was slightly injured by coming in collision with the steamer Gore, in the Detroit river, on the 8d of October last.

The scow was coming up the river at night, before and with a fair wind, at the rate of two miles an hour, and according to the testimony of her captain, close to the Canada shore, and nearly opposite the village of Sandwich. The night was starlight. The steamer having two vessels in tow, was first discovered about half a mile off descending the river. The collision took place close in by the American shore, almost directly opposite Fort Wayne.

The proofs were taken in open court, and the manner as well as the statements of the witnesses, under the immediate personal observation of the court. This was of some consequence, as the testimony in relation to the leading facts are wholly irreconcilable; and when such is the case, the demeanor of the witness will frequently give the preponderance to one side or the other.

The two witnesses brought to sustain the claim of the libellant,

are the master and the mate. Their statements do not altogether agree.

While the clear, consecutive and circumstantial narrative of Captain Sloan, is fully sustained by Botswood, the wheelsman, and Leonard, the mate of the White Squall, one of the vessels had in tow.

They unitedly contradict Boyle, the master of the scow, as to the course of the scow, and the place of collision.

They unitedly testify to the course of the steamtug being direct for the fort, and keeping close to the American shore. Whereas, Boyle and his mate differed somewhat as to this, and also as to the course of the scow; the latter testifying, that the scow kept near the centre of the river, on the Canada side of the channel.

John Campbell, the wheelsman, was not brought forward as a witness.

Now, where it has been clearly established, that the respondent's vessel was not in fault in any respect, where her course was proper, and not such as to endanger an ascending vessel, that was on the look-out and careful; where she had a proper watch, and proper lights, gave the alarm signal in time, ported in time, kept ported, reversed her engine, and backed, and did all in her power to avoid the scow; all of which facts appear in this case, and are inconsistent with the requisite care on the other side; the court cannot attribute the collision to unavoidable accident, but must presume from the testimony, that the fault was in the scow, either that of inexcusable ignorance or recklessness in the master; and I think the latter.

The rule as cited in *The Leopard*, from the Shannon, that the vessel which has it most in her power to vary her course and keep out of the way, must do so, is not infringed under the circumstances, by the satisfactory proof of the steamer's course and the conduct of her master. It is certainly not to be presumed when a collision takes place between a steamer and a sail vessel, that the former must be in fault, regardless of the course taken, merely because as a steamer she has ever the control over her own motions. It is the old rule applied to steam navigation, treating steamers as sailing with a fair wind, and therefore bound

The Steamboat Fashion.

to give way to a vessel close hauled. And here she did give way. She hugged the American shore as closely as possible, keeping as far off as she could, rang the signal bell, to give the scow, which was ascending with a fair wind, notice of danger, and let off steam. Yet, notwithstanding all her precautions, with a recklessness unexplained by the libellant, the scow shot directly across from Sandwich, and collided with the bark in tow.

I can do no otherwise than decree a dismissal of the libel, with costs.

Decree entered accordingly.

MOORE & FOOTE v. THE STEAMBOAT FASHION.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. A receipt of payment by note, is only *prima facie* evidence of payment, which may always be explained by other testimony.
2. A receipt unexplained, is conclusive, and the party against whom it is produced, must establish its character, if he wishes to avoid its legitimate effect.
3. A lien for materials furnished to a vessel, may be waived either at the time the materials are furnished, or by a subsequent agreement on the part of the creditor. If the creditor agrees to look to other security, no lien attaches.
4. Where a creditor, on taking a promissory note upon a demand for which, by law, he has a lien upon a vessel, accompanies the act with the evident intention of looking only to the note, and not to the vessel, for payment, such intention, however manifested, operates as an abandonment of the lien.
5. In cases of supplies and materials furnished to a vessel, the material man is not deprived of any of his remedies except upon the most conclusive proof that exclusive credit has been given to other security than the vessel; its owner, or master.
6. Where a material man relies exclusively upon the credit of the master, or owner, for payment of his demand, no lien is created upon the vessel; but the lien having accrued, it will not be released except upon the clearest proof of the creditor's intention to release it.
7. Where a boat's creditor receives a promissory note upon his demand, and where

The Steamboat Fashion.

the circumstances show that the only design in taking the note was to grant an extension of time for payment of the demand: *Held*, that there was no abandonment of the lien upon the boat, which had previously existed.

THIS was a libel *in rem* for a balance alleged to be due on a bill of ship chandlery, furnished to the Fashion, during the spring of 1853, by Moore & Foote, merchants at Detroit. The only controversy was as to the amount due to the libelants. The balance claimed in the libel was \$141.44. The answer of the claimant, who was the master and also the owner of the boat, alleged that only \$13.53 remained unpaid; and that that amount, with costs, had been duly tendered to the libelants, and by them refused. From the allegations and admissions of the parties, and the proofs taken in the case, it appeared that a bill of the amount due to the libelants on the 22d of May, 1854, was presented for payment on two occasions, by George F. Bagley, a clerk of the libelants, to Henry L. Newberry, the owner of the Fashion, at Chicago, Illinois. Bagley intimated to Newberry, that unless payment was made, the boat would be attached. On the second occasion, Newberry wishing for further time, Bagley offered to take a negotiable note for the amount, to be signed by Newberry and some other person. This offer was acceded to by Newberry, who thereupon gave to Bagley the promissory note of himself and one J. R. Hugenins, for the amount claimed, payable in thirty days, to the order of the libelants. On receiving this note, Bagley delivered the bill which he had presented, to Newberry, after first writing at its foot as follows:

“CHICAGO, May 22, 1854.

“Received payment, by H. L. Newberry & J. R. Hugenins’ note, at 30 days.

“MOORE & FOOTE,
“*per* Bagley.”

The note was delivered to the libelants, who subsequently procured it to be discounted at an exchange office on the strength of their indorsement. It was not paid at maturity, and the libelants were compelled to take it up. It still remaining unpaid, the libelants produced it in court to be canceled or surrendered

The Steamboat Fashion.

to the makers. Bagley testified that he had general authority to collect the libelants' demand, but no special authority to waive their lien on the steamboat, or to take a note in payment of the account. The question made on the hearing of the cause was as to the effect of taking the note of Newberry and Hugenins on the libelant's demand.

Walkers & Russell, for the libelants.

The taking of the note operated only as a suspension of proceedings on the libelants' demand, not as a satisfaction of the debt. *Schermerhorn v. Loines*, 7 John. 311; *Stedman v. Gooch*, 1 Esp. 4; 1 Cowen, 306; *Idem*, 359; 2 Metcalf, 76; 8 Pick. 522; 8 John. 304; 10 Peters, 532; 3 Denio, 410; 4 Mason, 248; *The Bark Chusan*, 2 Story, 459; *The Eagle*, Bee's Admiralty, 79.

Hunt & Newberry, for the claimant.

I. The giving of a negotiable note by a debtor to a creditor extinguishes the original debt.

(1) To hold a contrary doctrine, in case like the one at bar, would give two separate rights of action, distinct in their nature, for one cause of action. The original creditor might sue the boat—the holders of the note sue the maker.

(2) A contrary decision would give secret liens to a class of floating property, which might lie dormant and secret for years, until the note matured, and then be brought forward, to the great damage of innocent purchasers of a vessel.

II. When new parties are taken on a note in payment of a debt, it then is an absolute discharge, unless a contrary agreement is proved.

III. The assignment of a lien, or the claim of a material man, on a vessel, is an extinguishment of the lien, and once having been extinguished, it can never be revived. 6 Shep. 249; 10 Shep. 211; 1 Rich. 111; 6 Cranch, 264; 13 Vermont, 456; 12 Johns. 410; 1 Hill, 516; 16 Vermont, 30; 2 Metcalf, 173; 18 Pick. 360; 21 Pick. 230; 24 Pick. 13; 1 Day, 510; 3 McLean, 265; 14 Wend. 116; 7 Barr, 394; 4 Georgia, 185; 1 Smith's Leading Cases, 393, *et seq.*; 10 Barb. 372; 1 Howard (Miss.), 144.

WILKINS, J.—The clerk of the libelants, clothed with a general authority to collect the debt comprehended in the bill attached to the libel, presented the same to the respondent and demanded its adjustment. The respondent was unable, at that time, to make payment. On a subsequent day the clerk renewed his application for payment, and expressed his willingness to take a negotiable note for the amount, if a certain individual, whom he mentioned, would join in the same, and agreed that upon receiving such note, he would extend to respondent the credit he requested, stating at the time that if his proposition was not complied with, he would be compelled to attach the boat. The note indicated was obtained and the account receipted as "paid by note." This note, being indorsed by the libelants, was cashed at a broker's office, and, not being paid at maturity, was returned to them. It is now exhibited in court by the libelants, and offered to be canceled. The libel is brought on the original account. The plea is payment to the amount of the note, and tender of the balance.

The Circuit Court of the United States for this district, in *Allen v. King*, 4 McLean, 128, and *Weed v. Swan*, 3 McLean, 265, has settled the law that a receipt of payment by note is only *prima facie* evidence of payment, which may always be explained by other extraneous testimony, showing the circumstances under which the receipt was given, and that there was in fact no actual payment of the debt. A review of the conflicting decisions in other states is unnecessary, as there is nothing in the receipt given in evidence in this case which takes it out of the ruling of the Circuit Court in the two cases cited from McLean. Most of the cases cited on the hearing were considered in *Allen v. King*. There is no evidence of any agreement between the parties that the note should discharge the pre-existing debt. The receipt, unexplained, would have been conclusive. The party against whom it is produced must establish its character. The proofs show that the note was not received in absolute discharge of the debt. The captain wanted time; the libelants' agent was willing to give time. With this spirit of accommodation the note was received. The agent's statement that unless the account was arranged, the vessel should be attached, can, by no fair principle

The Steamboat Fashion.

of construction, be held to signify the extinguishment of the debt. Moreover it appears that the agent was only invested with power to collect debts. He had no authority to exchange securities, and especially one of a higher for one of a lower grade—a security *in rem*, for one *in personam*. The cashing of the note by the broker was solely upon the strength of the libelants' contract of indorsement, not on the face of the note or its intrinsic credit.

Holding that the note was not a satisfaction of the debt, the only question remaining to be disposed of is, was the lien abandoned by the libelants? Where materials are furnished to a vessel, the credit is given either to the owner, or the master thereof, or to the vessel itself, and the law creates the lien on the latter. Such lien, however, may be waived, either at the time the materials are furnished, or by a subsequent agreement on the part of the creditor. He may agree to look to other security and if so, no lien attaches.

In the case of *DeGraff v. The Moffat*, heretofore tried in this court (and cited on the argument of this cause), the contract, at the time it was entered into between the parties, embraced a credit by the notes of the respondent. After the libelant had closed his proofs, the respondent introduced a paper, showing a settlement between the parties, in which sundry notes were credited and admitted as cash. The account appeared as balanced, and for the sum remaining due before the balance was struck, a receipt in full was given, in which it was expressed that payment was made by a new note. The note was not produced in court, or offered for cancelation. No evidence was introduced to show any agreement or understanding, between the parties, varying, modifying or contradicting this receipt, and the court held, as in *Allen v. King*, that it was a *prima facie* evidence of settlement, and that the original agreement waived all lien upon the vessel. That case does not apply to the facts in this.

Although a note, under certain circumstances, is no extinguishment of an original debt against a vessel, on account of which it was given, yet, when the creditor receiving it in payment, accompanies the act with the evident intention of looking

thereafter only to the note, and not to the vessel, such intention, however manifested, operates as an abandonment of the lien which the law gives him as security for his debt. Was there such an intention manifested in this case? Was there an understanding that the boat should be released from the lien? It is in proof that she was not, at the interview between the master and the libelants' agent, yet under attachment, although liable thereto. It is in proof that the respondent wanted time; that the libelants wanted money; that the agent held forth the threat that the vessel would be attached; and that, under these circumstances, the note was procured. This is all that goes to shed any light upon the question of abandoning the lien.

Now, if the note was not taken in absolute payment, was it taken as additional security? It, certainly, was not higher security; the new name did not give it that character. And if it was not taken either as collateral, or higher security, for what purpose was it taken? Undoubtedly it was for the sole purpose of enabling the parties to raise money upon at the time; for the mutual accommodation of the libelants and the respondent, by placing the former in possession of funds which they then needed, and extending to the latter further time to meet an acknowledged obligation. The intention of the parties is too obvious to be overlooked. The one did not receive the note in discharge of the debt or the lien; the other did not give it with such an understanding. It was to be payment, if paid at maturity. If unpaid, all the relations of the parties remained unchanged.

The circumstance that the note was cashed on the indorsement of the libelants, does not vary the transaction, or exhibit a different intention from that disclosed by the proofs. The note gave thirty days' time to the respondent. Until that time elapsed, the vessel could not be attached; not because the debt was paid, or the lien waived, but because the note and its discount evidenced an agreement to await its maturity, and the default of the makers to meet their contract. It was in proof that the note was discounted on the indorsement of the libelants; and that it was never paid by the makers, but by the libelants, is also clearly in proof, first, by their possession of the

The Steamboat Fashion.

note, and second by the statement of the witness that it was returned by the indorsees, and the libelants charged with the amount in their account current.

In cases of this description, the material man is not deprived of any of his remedies, except upon the most conclusive proof that exclusive credit has been given to other security than the owner, the master or the ship. Looking to either of the former, to the exclusion of the latter, releases the lien; but in no case will either be released, except upon the clearest proof that such was the intention of the contracting parties. Such is the rule in all cases governed by the maritime law. That credit was originally extended to the vessel in this case, is not questioned. The schedule attached to the answer (to which the receipt relied upon is appended), reads: "steamboat Fashion to Moore & Foot Dr.: to merch. rendered on account," &c. The lien, then, was in existence, and stated when the receipt was given, and there is nothing in the language of either party exhibiting an intention to abandon or waive such lien.

The court was forcibly impressed during the hearing, with the fact that as the note taken was negotiable, and had been discounted, and the libelants had received the money upon it, the relation between them and the vessel was thereby changed; but the production of the note and the tender thereof for cancellation removed the difficulty which I apprehended from sustaining the lien. The note is not outstanding and no innocent indorsee is interested in the issue of the trial. No holder of the note can be periled by a secret lien upon the boat. Neither can the libelants be considered as the assignees of a chose in action. They indorsed for their own benefit, and the makers failing to pay, they took back the note. The libel is not based upon the note but upon the credit for materials extended to the boat. Had the action been brought in the circuit, and upon the note, the objection might be considered fatal as a question of jurisdiction, not otherwise.

The vessel contracted the debt; the debt never has been paid; the note was not payment, but a written promise to pay, which has been violated; there was no agreement to take it in discharge of the lien. All the circumstances show that it was but

The Plymouth.

an extension of time for the accommodation of the master ; and by taking it for that purpose, and for that purpose alone, there was no abandonment of the previous existing lien. Even if such abandonment had been made by an unauthorized agent, it could have been repudiated by the principal. The debt is still due—the character of the indebtedment still continues, viz: for materials furnished to the steamboat Fashion—and in this tribunal, as a court of equity, the respondent will not be dealt with inequitably by enforcing payment of the boat's debt, from the boat itself—a debt not denied by the respondent, and which by the instrument exhibited in defence, taken in connection with the note identified, appears, beyond all doubt, never to have been liquidated. The original lien created by this debt never having been waived or extinguished, we must order a decree in favor of the libelants for their entire claim, with costs, and direct that the note be canceled on payment of the decree.

Decree accordingly.

DWIGHT SCOTT *v.* THE PROPELLER PLYMOUTH.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. Where a steam propeller was built by ship builders at Cleveland, under a contract with parties resident of Buffalo, New York, *held*, that the former place was her home port until after her delivery and first voyage.
2. The statute of Ohio of 1840, commonly called the boat and vessel law, as construed by the Supreme Court of Ohio, gives no lien upon a vessel for repairs.
3. Where the interest of a witness is balanced, his testimony is competent.

LIBEL filed for the recovery of a bill for painting the propeller while lying in the port of Cleveland, Ohio. It appeared in the proofs that the propeller was built by the firm of Lafronier & Stevenson, boat builders, Cleveland, under contract with George H. Bryant & Co., merchants, Buffalo, N. Y. That a considera-

The Plymouth.

ble sum had been advanced, and the balance due satisfactorily adjusted before the delivery of the vessel, which formally took place in May, 1844, when she sailed on her first voyage to Buffalo, the libelant interposing no claim, and making no objection, although aware of the delivery of the vessel to Bryant & Co.

The libelant was a ship-painter, and was engaged, when he performed the work for the Plymouth, in painting other vessels in the ship-yard of Lafronier & Stevenson, with whom he kept a general account of work and cash payments.

The painting of the Plymouth was at the request of Lafronier & Stevenson, and amounted in all to about thirteen hundred dollars, upon which five hundred had been paid, and credited to Lafronier & Stevenson when the propeller was delivered to Bryant & Co. Subsequently, Lafronier & Stevenson failed in business, and the libelant institutes this action against the vessel for the balance due.

Miller & Campbell, for libelant,

Insisted—1st. That there was a maritime lien upon the vessel, inasmuch as the owners resided in Buffalo, and the work was on their vessel. There was no owner until the vessel was finished; and when finished, by the contract she was owned in a foreign port. In support of this proposition, the counsel cited: 3 Kent Com. 132 and 143; Conklin's Admiralty, 56; Davies Rep. 202; 9 Wheaton, 65.

2d. If the libelant had not a maritime lien for the painting, he acquired such lien under the local law of Ohio, which will be enforced in the United States court. Swan's Statutes of Ohio, 185, 551; Conklin's Admiralty, 57; 2 Gallison, 474; 1 Story, 244; 1 Sumner, 78; Gilpin's Rep. 473.

3d. The allegations of the answer are unsupported, because the testimony of Lafronier & Stevenson is incompetent, and should not be received.

Messrs. Lothrop & Duffield, for respondents.

1st. That the ownership of the Plymouth, when the debt was contracted, was in Lafronier & Stevenson; Bryant & Co. having no interest until she was finished and delivered. *Muchlow v.*

The Plymouth.

Munger, 1 Taunton, 318; *Oldfield v. Low*, 9 Barnewall & Cres. 72; *Simmons v. Swift*, 5 B. & C. 857; *Atkinson v. Bell*, 9 B. & C. 277; *Clark v. Spence*, 4 Ad. & E.; 2 Meea. & Wels. 602; *Laidlow & Bell*, and *American Laws*; 4 Rawle, 280; 7 Johns. 473; 11 Wendell, 135; 6 Pick. 209; 9 Pick. 500.

2d. No lien is given by the law of Ohio. *Jones v. The Commerce*, 14 Ohio, 408.

3d. The interest of Lafronier & Stevenson is balanced and therefore competent.

WILKINS, J.—1. Under the proofs submitted, the libellant acquired no maritime lien. His contract was with Lafronier & Stevenson, to whom alone he gave credit. Bryant & Co. had no property in the vessel until delivered; and the work for which the suit is instituted, was performed by the libellant before the vessel was delivered. Cleveland was her home port, when in process of construction, and the fact that the libellant kept a general account with Lafronier & Stevenson, for painting the various vessels built by them, and that he was engaged in painting other vessels at the same time with the Plymouth, shows that he looked to them for his payments, and not to the future vessel.

Until completed, there was no vessel in existence on which a maritime lien could attach. The material man and his employer resided at Cleveland, and not until after her first voyage was her home port at Buffalo. So far, therefore, the libel sets forth a claim for work and materials, furnished at a home port, and, consequently, created no lien. Abbott on Ship. 143, note.

2. No lien was given by the statutes of Ohio. The mechanics' lien law of that state (Swan's Edition of Statutes, Chap. 69), passed March 11, 1843, creating a lien in favor of mechanics, does not apply to this case, as the pre-requisite acts to perfect the lien, prescribed in the substitute for section 7th, have not been complied with. And the statute of 1840, commonly called the Boat and Vessel Law, according to the construction of the Supreme Court of Ohio, gives no such lien. *Jones v. The Commerce*, 14 Ohio, 408.

3. Lafronier and Stevenson, under the circumstances, are con-

The Arrow.

sidered by the court as competent witnesses. Their interest in this controversy, is balanced. They are answerable to the libellant for the amount claimed, should he fail in this suit; and should he recover—Bryant & Co. having paid for the propeller according to contract—they would be obligated to refund them the amount recovered here.

Libel dismissed.

THOMAS BUTLER v. THE STEAMBOAT ARROW.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. When a receipt is introduced as evidence of the contract of affreightment, the whole document is in proof, and one part cannot be separated from the other in its judicial interpretation.
2. After the voyage had been completed, the clerk of a steamer sailing between Sandusky, Ohio, and Detroit, Michigan, gives the following receipt to the owner of a horse lost between Detroit and Chatham, another steamer having received the horse at Detroit.
 "Received of T. B., three dollars for transporting horse from Sandusky to Chatham. One dollar for the steamer Ploughboy, and two dollars for the steamer Arrow. The horse (by consent) transferred to the Ploughboy, October 30, 1852." Parol evidence admitted to explain the receipt.

H. K. Clark, for libelants.

Jas. V. Campbell, for respondents.

WILKINS, J.—The libellant alleges, that on the 30th of October, 1852, he shipped by the Arrow from Sandusky, Ohio, his horse, for the village of Chatham, in the province of Canada West, for the sum of \$3.00 then paid: that the steamer, then lying at Sandusky, through her captain, then and there contracted with libellant to deliver the said horse to one John Davis

The Arrow.

at said village of Chatham, and that the said horse was never so conveyed or delivered.

The answer of the owner, fully denies this allegation, and the contract as exhibited, and further shows, "That the steamboat was employed at the time alleged in running between Sandusky and Detroit, and no other route, and no further than Detroit, and that the same was then well known to libellant: that the libellant at the time alleged, applied to the clerk of the steamer to receive on board a horse to be carried to Detroit, and there to be delivered to the steamboat Ploughboy (a boat running from Detroit to Chatham), to be conveyed to Chatham: that the clerk of the Arrow agreed to receive said horse, convey him to Detroit, and there deliver him to said steamer Ploughboy, to be conveyed to Chatham: that the said libellant paid to the clerk, the sum of two dollars, for the transportation of the horse to Detroit, and also the further sum of one dollar to be paid to the Ploughboy, for conveying the horse from Detroit to Chatham: that the said horse was conveyed to Detroit on the steamer Arrow, and by the mate thereof, placed on the Ploughboy shortly after her arrival at the wharf, and the one dollar paid for the transportation to Chatham as directed."

The libellant claims the value of the horse which was lost from the Ploughboy. The only proof brought to support the exhibits of the libel, is a receipt by the clerk of the Arrow, given to the libellant, after the voyage had been completed by the Arrow, and she had returned to Sandusky. That receipt reads as follows: "Received of Thomas Butler, \$3.00, for transporting horse from Sandusky to Chatham, \$1.00 for the Ploughboy, and \$2.00 for the Arrow; the horse by consent was put aboard the Ploughboy, October 30th, 1852."

This proof by no means establishes the contract of affreightment as exhibited in the libel. The contract set forth was that the Arrow was to deliver the horse to one John Davis at Chatham. But here, part of the consideration is specified as being paid to another boat, and a statement that the horse was delivered to such other boat. The whole document and not a part, is in proof, and the one part cannot be separated from the other, in its judicial interpretation.

The Julia Smith.

Without explanation it is ambiguous. The three dollars for the transportation to Chatham is subsequently divided between two vessels, and without proof that they ran in connection, this receipt would not be satisfactory to charge the Arrow, especially from the answer of the owner, which corresponds with the document, and with its closing declaration that "the horse was put on board the Ploughboy."

Without infringing upon the rule, then, that a written instrument cannot be modified by parol proof, we are necessarily compelled here to resort to the proof furnished by the claimant of the Arrow, and this completely sustains the defence.

1st. That the agreement was to deliver the horse at Detroit, and to the steamer Ploughboy, for conveyance to Chatham; and that such agreement was fully performed.

2d. That the route of the Arrow at the time of the alleged contract, terminated at Detroit, and that this was known to libellant.

3d. That the clerk of the Arrow did not receive the whole consideration for the whole route as compensation to the Arrow, but only two dollars for the Arrow, and agreed to act as the agent of the libellant in paying the other dollar to the Ploughboy.

4th. That the Arrow, under the circumstances, is not answerable for the loss of the horse, sustained in consequence of the neglect of the Ploughboy.

Libel dismissed.

HENRY C. JACKSON Libellant, HENRY WATERS Intervening
v. THE SCHOONER JULIA SMITH.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. Where a person in possession of a vessel under a contract for the purchase, re-

62 DISTRICT COURT OF THE UNITED STATES.

The Julia Smith.

refuses to fulfill his contract, it does not render his possession *tortious*, especially as to third parties.

2. A contract of affreightment, made by the person in possession, or his agent, under such circumstances, is binding upon the vessel. Ostensible ownership and present possession and authority are sufficient to give one a right to bind the ship.
3. Where goods regularly shipped are not delivered according to the contract, the carrier is bound to make good to the shipper the actual loss he has sustained. The measure of damages here, is the value of the cargo when shipped, with interest.
4. The court refuse to give the libelant his expenses coming to Detroit to hunt up the property, or expenses incurred in defending the suit in court.

Wilcox & Gray, for libelants.

Lothrop & Duffield, for respondents.

The cases were heard upon the following agreement as to the facts:

"For the purposes of the trial of the above entitled causes, the following facts are hereby admitted.

1st. "On and previous to the 9th of September, 1853, Geo. S. Lester was the owner of said schooner, and on said day entered into the contract in writing, mentioned in the fourth article of the answer, with James Reeve, for the sale and purchase of said vessel.

2d. "Upon the execution of said contract Reeve took the exclusive possession of the schooner, and from that time until the 11th of June, 1854, continued in the possession of said schooner, and used and employed her in the carrying trade between different ports in the province of Canada.

3d. "On or about the 8th of June, 1854, said schooner was at the port of Chatham, in Canada, and John Bruce was acting and in control of her as captain, under appointment of Reeve. On said day the libelants, being then and there the owners of the property mentioned respectively in their libels, under a contract of affreightment entered into with said Reeve & Bruce, shipped on board of said schooner in good order, the said property, to be by said schooner carried to and delivered at the port of Garden Island, for a certain hire and compensation then agreed on.

The Julia Smith.

4th. "On said last day, the schooner with said property on board, sailed from Chatham for Garden Island, and on the 11th of June, while passing through Detroit river, said George S. Lester claiming to be her owner, and entitled to possession, caused her to be taken by force, and against the will of said Bruce and his crew, and caused her to be carried into Detroit. On the 12th of June, said Lester caused the sheriff of Wayne county to take said schooner upon a writ of replevin, issued out of the Circuit Court, in favor of said Lester vs. said Reeve, after which said Lester gave bond, pursuant to the statute, and received from the sheriff possession of said schooner, and retained the same until he sold and delivered it to the respondents, as stated in the answer.

5th. "On the day of , 1854, a libel was filed against said property on behalf of the United States, in this court. The libelants in this cause appeared and defended. All the papers filed in, and the records of which libel suit, are hereby admitted, so far as competent, to be in evidence in these causes.

6th. "Pending the said libel suit on behalf of the United States, Waters bonded his staves, but the tobacco of Jackson was sold, and bid in by Lester, for the sum of \$, of which amount \$53.41 was paid over to said Jackson.

7th. "That directly after Lester had received possession of the vessel from the sheriff, the captain abandoned the vessel and cargo, and the libelants having no agent in Detroit, Lester caused said cargo to be unloaded and the tobacco and oats to be placed in warehouse for the owners: that on said sale of said tobacco, Lester bid it in for the owners, but not at their request, and has held the same subject to the order of Jackson, after he shall repay said Lester the sum paid by him at said sale."

"LOTHROP & DUFFIELD, *Atty. for Lester.*

"WILCOX & GRAY, *for libelants.*"

"It is further admitted for the purposes of the argument in this case, that before the said contract of affreightment was made, the said Lester offered to execute to Reeve a bill of sale of the vessel, if Reeve would execute the mortgage on the same, for the balance of the purchase money, as stipulated in the said contract of sale, or if Reeve would pay the balance of the purchase

The Julia Smith.

money of the vessel; but Reeve refused to do either of said things: that Lester then demanded possession of the vessel, which Reeve refused to give."

"WILCOX & GRAY, *Proctors for libelants.*"

The 4th article of answers is as follows, "That on the 9th of September, 1853, G. S. Lester, the owner of said schooner entered into a contract with James Reeve, for the sale of said schooner, at \$2,500: that R. was to have immediate possession: that L. was to execute to R. on the 14th of September, a bill of sale, and on same day R. was to execute to L. a mortgage to secure the balance unpaid."

WILKINS, J.—The libel and evidence in this case exhibit a contract of affreightment, entered into at Chatham, Canada West, between the libellant and the vessel, on the 8th of June, 1854, for the transportation and delivery of a quantity of tobacco at Garden Island, near the port of Kingston.

It is further shown that the tobacco was received, and that the vessel departed upon her voyage, but that the tobacco was not transported and delivered according to contract, having been intercepted at Detroit, in consequence of the same having been landed at that place, in supposed violation of the revenue laws of the United States.

Damages are claimed for the breach of the contract. It is in proof that on the 9th day of September, 1853, one George S. Lester was the owner of the vessel, and under a contract of sale with James Reeve, then gave him the *exclusive* possession of the same, and that *this* exclusive possession continued in the said Reeve up to the 11th of June, 1854, three days subsequent to the contract of affreightment made in the libellant.

It is also in proof, that while this possession continued, the vessel was employed by the said Reeve, in the coasting trade between different ports in the province of Canada, and that at the time the contract of affreightment was entered into, she was under the command and control of one John Bruce, as master, holding his appointment from the said Reeve: that the said tobacco was then shipped at the port of Chatham, the said

The Julia Smith.

Bruce as master, contracting for a stipulated compensation to deliver the same in good order at her port of destination.

It is conceded that the contract of sale between Lester & Reeve, was broken by the latter, in his not making the payments promised, and that, on the 11th of June, 1854, the former sued out from the appropriate court of the state of Michigan, a writ of replevin, by which the vessel was seized by the sheriff of Wayne county, and forcibly, and against the will of her master, brought into the port of Detroit; and as averred in the answer, was sold and delivered to the respondent: that on receiving possession of the said vessel from the sheriff, her cargo was discharged by Lester, and the tobacco being seized by the revenue officers, was deposited in a warehouse for, and afterwards sold and bought in by Lester, subject to the order of the owners: that the libellant had no agent in Detroit, and Lester now holds the same for the libellant, to be delivered on being reimbursed his expenses.

There is no proof that any public notice was given by Lester, of his claim to the vessel, or that Reeve had not kept his engagement, from September, 1853, till June, 1854, or that the libellant was made aware of the true character of the vessel, when he shipped his property at Chatham. Before and at the time of the contract of sale, she was called the Julia Smith; when in the possession of Reeve, she was called the Mazeppa.

Under the circumstances disclosed, the possession of Reeve was not tortious. His refusal to carry out his contract, did not affect the character of his possession, especially as to third parties. He took possession with Lester's consent, and was, therefore, clothed with power to use her as long as that possession continued. Bruce was her master, and at the time of the contract of affreightment rightfully represented and could bind the vessel. It is not the case of a vessel stolen, or where possession has been fraudently obtained. The vessel was delivered to Reeve at the time of the contract by Lester, and the former's failure to fulfill his engagement, did not make his possession unlawful *ab initio*, or vitiate the contracts of the vessel while this possession continued. Such a rule would be destructive of maritime confidence, and place the shipper in a foreign port on inquiry as to title, which is not necessary, and would in most cases be impracticable. Ostensi-

The Julia Smith.

ble ownership, and present possession and authority, are sufficient to bind the vessel. The rights of seamen and shippers cannot be affected by the unknown private contracts of other parties claiming interest in, or controverting her title.

The contract being binding on the vessel, and the goods never having been delivered, the only question remaining is, as to the measure of damages. When goods regularly shipped, are not delivered according to contract, the carrier is bound to make good to the shipper the actual loss which he has sustained ; or, in other words, to place him in as good a position as he was when the contract was made. In determining this question, the court has nothing to do with the antecedent or subsequent relation which Lester bore to the vessel. The contract was with the Julia Smith, then known as the Mazeppa. Whether or not Lester had a right to retake the vessel, and that the damages accrued in the exercise of his legal right, is not the question before the court. The vessel being held responsible, must make good to the libellant his loss, consequent on the failure to perform the contract. This clearly embraces the value of the tobacco shipped at the port of Chatham at the time of the contract ; crediting the vessel with the amount received, as the proceeds of sale. Lester is not entitled to be reimbursed for his expenses by the libellant. The captain of the vessel was the agent of the shipper, and the property having passed from his custody, his agency ceased, but that of Lester was not created. I cannot assent to go beyond this principle, in the assessment of damages. Having determined that the vessel is responsible for the contract, and consequently responsible for its non-fulfillment, and, therefore, bound to make good the loss, I am not satisfied that the expenses of the libellant in visiting Detroit in search of his property, and defending the same in court, can be properly embraced within the measure of damages. The market value of the tobacco at Chatham, when shipped, with interest on such value, is making good the loss on the contract, and as against the vessel. The landing of the goods without manifest, was not the act of the vessel, and if it was, it should not enhance the damages in this suit. The leading question here is, the injury consequent on the non-delivery at Garden Island ; and as there is no proof that libellants have suffered in

The Steamboat Fashion.

that regard, the measure must be the value irrespective of incidents independent of the contract. The tobacco has not been delivered, has not been received, neither is there proof that in consequence of its non-delivery the libellant has been put to other loss. Decree therefore for the value of the tobacco at Chatham, on the 8th of June, 1854, interest on such value, and the clerk to take the necessary proof, crediting the respondent with any money paid on account.

As to Waters, the intervening libellant, decree for the value of the staves, with interest from the same date. His bonding the articles after seizure and defending the same in court, does not come within my view of the vessel's making the shipper good, under the contract of affreightment. Either the present owner or Reeve, may be answerable in another form of action for this claim; but as it was not necessary for Waters either to bond or to prosecute, in order to secure his rights under the contract, I cannot decree his expenses as a legitimate part of the damages in this case.

HENRY L. NEWBERRY, Libellant *v.* THE STEAMBOAT FASHION,
Respondent.

*District Court of the United States. District of Michigan. In
Admiralty.*

HON. ROSS WILKINS, JUDGE.

1. Where one sells a steamboat with all appurtenances, &c., and prior to the sale, the owner had procured a new ash-pan for the boiler, which had been delivered to the owner, but was not placed on board the boat, *held*, that the ash-pan passed under the bill of sale as appurtenant to the boat.

John S. Newberry, for libellant.

Levi Bishop, for respondent.

The Steamboat Fashion.

WILKINS, J.—This libel is brought to recover the value of an ash-pan, taken by the claimants from the dock of Oliver Newberry, and by them fixed in their steamboat.

The libelant was the former owner of the Fashion, and during his ownership, in 1854, procured this new ash-pan, for her use, the old one being worn out, and rendering the navigation of his vessel unsafe. It is in testimony that this new ash-pan was delivered for the Fashion, at the dock of Oliver Newberry, and there remained during the winter of 1854-5, the navigation being closed, and the Fashion being in dock for the winter. It is in proof also that by measurement, the new ash-pan fitted the vessel for which it was made, and that the old one was unfit for service, and of no value but as old iron.

On the 14th of February, 1855, the libelant sold the Fashion to Oliver Newberry, the ash-pan in question being then on his dock; and by the bill of sale transferred his title in the boat with her engine, tackle, apparel, furniture and appurtenances, to the vendee, who, shortly after, by a similar bill of sale, sold the same to the respondents.

After this sale, the engineer of the Fashion sent for the ash-pan, and on inquiry at the counting-room of Oliver Newberry, it was pointed out by one of the clerks, and the same was taken without dissent, and placed on the Fashion. The bill of sale controls the question, as to the intention of the parties. It is true that Oliver Newberry bought the vessel, without a knowledge of the fact, whether or not a new ash-pan was necessary, and had been procured; but his purchase embraced all that properly appertained to the vessel, her tackle, her fixtures and her apparel; and such was clearly the intention of both vendor and vendee, when they executed the bill of sale. Had Oliver Newberry remained the owner, and fitted out the vessel in the spring, there can be no question but what he would have claimed the ash-pan as an appurtenance embraced in the bill of sale—and rightfully too—and his sale to the respondents passed all his rights.

Decree dismissing libel, with costs.

LEWIS IVES, Libellant v. THE STEAMBOAT BUCKEYE STATE.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. In the case of a libel for repairs to a vessel, whether an estimate of profits that the vessel might have made had she not been unreasonably detained by the libellant in making the repairs, can be allowed as a set-off to the libellant's bill.
Quere?
2. Dockage in a dry dock is in the nature of rent, and subject to the will of the proprietor of the dock.
3. A printed tariff of charges at a dry dock not brought to the notice of the master or owner of a vessel taken into such dock for repairs, is not binding upon such master or owner.
4. Where the proprietor of a dry-dock charges twenty shillings per day for the labor of his men in repairing vessels taken into the dock, but only pays them eighteen shillings per day, the proprietor having also charged for his own time in superintending the men and their work, at the rate of \$4 per day; *Held*, that under the proofs of the case the extra two shillings per day on the men's time was an improper charge.

THE libel in this case was filed by Lewis Ives, proprietor of a dry dock in the vicinity of Detroit, to recover payment of a bill for docking and repairing the steamer, during the month of October, 1854. The amount claimed by the libellant for the docking of the boat was \$955.50. Of this sum \$318.50 was for "half dockage," so called, which was sought to be recovered on the ground that the steamer was detained in the dock four days beyond the time that it was understood she was to be kept in. Another item of the libellant's claim was for the work and labor of his men, amounting in all to two hundred and fifteen and a half days, for which he charged at the rate of twenty shillings per day; he also charged for his own time in superintending the men, nine and a half days at \$4 per day. Among the charges for materials used in making the repairs were nine bales of oakum at \$6.50 per bale, and three barrels pitch at \$6.50 per barrel. From the testimony in relation to the charge for half dockage,

The Steamboat Buckeye State.

it appeared that this was not a customary charge at similar docks in Buffalo, Cleveland and other places along the lakes, and although it appeared, from a printed tariff of the charges at the libelant's dock, that such a charge was usual there, in cases where vessels were detained in the dock beyond four days, yet it was not clear from the evidence that the master or owner of the Buckeye State ever saw this printed tariff before they allowed the steamer to go into the dock. It also appeared from the evidence, that the libelant only paid the men who worked on the repairs of the steamer at the rate of eighteen shillings per day, and for the oakum used at the rate of \$6 per bale, and for the pitch at the rate of \$5.50 per barrel. The charge for extra dockage, and the amounts charged for labor and materials, above the amounts actually paid by the libelant, were resisted by the claimant of the steamer.

It was set up in the answer, and insisted by way of defence to the entire of the libelant's demand, that the steamer was detained in the dock an unreasonable length of time: that the libelant did not place the requisite number of men at work on the repairs, and that by reason of his neglect so to do, the steamer was detained in the dock several days longer than she otherwise would have been, and that by reason of the delay in getting the steamer out of the dock, she lost an opportunity of making several trips in the most profitable line of steamers on Lake Erie, from which trips she could have cleared the sum of \$1,500, over and above all expenses, and this sum the respondent claimed to set off against the libelant's demand. Upon the question whether the steamer was detained in the dock an unreasonable space of time, or not, there was conflict in the testimony, but the preponderance of evidence on this point, in the judgment of the court, was in favor of the libelant. On the question of profits that might have been made by the steamer had she been released from the dock several days sooner than she was, the evidence fully sustained the allegations of the answer. It was further set up in defence, that the repairs to the steamer for which the libelant sought to recover, were not properly made; but this defence, as will be gathered from the opinion of the court, was not sustained.

G. T. Sheldon and John S. Newberry, for the libellant.

Lothrop & Duffield, for the claimant.

WILKINS, J.—The libel was filed in this case on a bill for dockage and repairs.

The court does not deem as tenable, the principal matters set up as defence to the libellant's demand, and for these reasons: 1st, as a question of fact, it does not satisfactorily appear, that the loss sustained by the claimant, if any, was the consequence of the negligence of the libellant. The boat was not detained beyond the time requisite for the repairs ordered: 2dly, as a question of law, the court is not prepared to adopt the rule, to the extent contended for, viz: that an estimate of probable profits for the time lost by the steamer is to be deducted as a set-off, from the bill of the libellant. When such a rule shall be enforced by this court, it will be on the clearest and the most unquestionable testimony.

3d. The other matter of defence, that the work was not performed in a workmanlike manner, is refuted by the preponderance of the evidence. Bloomer, Atkinson and Johnston are conclusive upon this point.

Thus disposing of the defence, the question arises, has the libellant established his account by satisfactory proof? It is not for the court to determine, without proof, whether or not a bill is exorbitant.

The first item is for dockage, which being the pecuniary compensation, for the use of a dock, while a vessel is undergoing repairs, is subject solely to the will of the proprietor. It is in the nature of rent, and the owner of a dry dock, has a right to demand from those who seek its use, whatever he considers a fair compensation, uncontrolled by the custom of other docks, in other places. House rent in Buffalo or Cleveland, is not to govern landlords in Detroit; although where there is no special agreement touching the subject, the usual rent of similar buildings in the same locality, would enlighten the judgment of a court as to what such property was worth.

The Steamboat Buckeye State

From the testimony of John Ives, it appears there was a special agreement in this case between Mr. Philips (the owner of the Buckeye), and the libelant, when the vessel was brought into dock, as to what the latter would charge for dockage. He says: "Captain Philips applied for the dockage of the Buckeye State, saying that she would have to be in three or four days. We told him that the dockage was fifty cents per ton. She was taken in on the 20th; my brother and the captain superintended taking her in: she was in dock until the 1st of November." This witness also testified to a printed tariff of charges to be made by the dock of the libelant, in which appears the charge of two shillings a ton, for the four days succeeding the first four days, and that he, as clerk, always made the half dockage charge; but it is not clear, that this tariff was brought to the knowledge of Philips or his captain, so as to bind him to an extra charge over the fifty cents per ton, agreed upon before the steamer was taken in, provided her repairs should occupy a longer time than was then anticipated.

The charge for dockage, is \$687, and if the item for half dockage be superadded, it would make the rent of the dock, for eleven days, \$955.50; a sum so improbable for the mere use of the dock, independent of repairs, that, without more direct proof, I cannot consider the charge for half dockage, as having been contemplated by the parties. This item is, therefore, rejected.

It is in proof, that but eighteen shillings per day was paid to the men hired to do the work, while twenty shillings is charged in the bill.

On no principle of justice, can the court sanction this charge. The libelant is responsible for the actual wages of the men employed, but no more. This additional charge, over and above what was paid to each man, cannot be considered in the light of compensation for the libelant's time, for he charges for his own superintendence at the rate of \$4 per day, for nine and a half days. The charge, therefore, for 215½ day's work, at twenty shillings, amounting to \$538.75, must be reduced by subtracting this extra charge of two shillings per day, which amounts to \$52.75, and makes the item properly chargeable.

The Schooner John Richards

\$486. The clerk will revise this calculation, and correct the amount accordingly.

On the same principle, the additional four shillings advance on the articles purchased and used in repairing the vessel, cannot be allowed. Why should the libelant be allowed to charge more than the market price for the articles used in the repairs? He paid \$6 per bale for oakum, and charges \$6.50. He paid \$5.75 per barrel for pitch, and charges \$6.50.

These additional sums must be deducted from the several charges. The deductions thus directed, reduce the libelant's bill to \$867.89, for which amount, with interest, let decree be entered.

Decree for \$940 and costs.

JOSEPH RIGGS, Libelant v. THE SCHOONER JOHN RICHARDS,
D. O'CALLAGHAN, Claimant.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. The proceedings before a circuit court commissioner of the state of Michigan, under the "boat and vessel" law of said state, cannot be considered as a proceeding *in rem*.
2. The Michigan statute for the collection of claims against ships, boats and vessels, and declaring lien thereon, for supplies and materials, makes no equal provision for claims arising in other states.
3. A state may by law create a maritime lien, unknown to the general maritime law, and may provide legal tribunals, and a mode of proceedings for the enforcement of such liens, other than proceedings *in rem*.
4. Proceedings *in rem* are peculiar to admiralty courts. They are international and not municipal.
5. Whenever municipal law appropriates the remedy *in rem* against vessels, it comes in direct conflict with the 2d section of the 3d article of the constitution of the United States.
6. State legislatures have no power to divest a lien existing in admiralty.
7. The possession of the vessel by the sheriff under state process, did not divest the lien in admiralty, or affect the process in the hands of the marshal.

The Schooner John Richards.

Walkers & Russell, for libellant.

Towle, Hunt and Newberry, for respondent.

This is a suit to recover possession, and determine the title of the vessel.

Libellant's title is under a sale, by virtue of the decree of the United States District Court, in admiralty.

Respondent's title is under a bill of sale, from the sheriff of Wayne county, by virtue of proceedings under the boat and vessel law.

The vessel was originally seized September 8th, 1855, in this court, under a libel filed by Riggs, a citizen of Michigan. Under this libel Brayman, of Ohio, intervened. No appearance was entered, and the vessel was condemned, sold and bid in by Riggs, December 24th, 12 o'clock, noon. In the state court the vessel had been seized August 29th, 1855, by the sheriff of Wayne county, under the boat and vessel law; he had taken her into a private dock, stripped her, and put her in charge of the owner of the dock. On this seizure proceedings were had, and the vessel sold and bid in by O'Callaghan, the claimant, December 24th, 10 A. M.

S. Towle, for respondent.

I. The proceedings in the state court were in all respects regular and legal, and in conformity with the statutes. See Revised Stat. of Mich., 1846, p. 537; Stat. of 1850, p. 206.

The only question raised by the libellant was, whether the sheriff had sufficient possession to hold against a subsequent seizure. A sheriff is not required to keep actual manual possession. *Hemmenway v. Wheeler*, 14 Pick. 408; *Bickwell v. Trickey*, 34 Maine, 273; *Mills v. Camp*, 14 Conn. 219; *Rives v. Porter*, 7 Iredell, 74; *Denny v. Warren*, 16 Mass. 420; *Gordon v. Jenney*, 16 Mass. 465; *Ashman v. Williams*, 8 Pick. 402.

The fact that the vessel was taken from the possession of the owners, was sufficient notice to the marshal of the levy. *Berry v. Smith*, 3 Wash. C. C. R. 63. But notice is not necessary.

The Schooner John Richards.

Tomlinson v. Collins, 20 Conn. 364; *Hemmenway v. Wheeler*, 14 Pick. 410; 6 Bacon Abrdg. 176.

II. The proceedings before the state tribunal, even if irregular, were sufficient to give the respondent (a purchaser) good title. *Elliott v. Pearsall*, 1 Pet. 340; *Sims & Wise v. Slocum*, 3 Cranch, 300, 307.

III. The seizure by the sheriff was a seizure of the *res*, under a proceeding *in rem*, upon a process co-ordinate, if not superior, to that issued from the admiralty court.

(1) The statute of Michigan creates a lien. *Watkins v. Atkinson*, 2 Mich. 151; *Bidwell v. Whitaker*, 1 Mich. 469; *Lawson v. Higgins*, 1 Mich. 225; *Turner v. Lewis*, 2 Mich. 350. The decisions of a state court will be followed by the United States courts in the interpretation of a local law. 7 How. U. S. R. 1, 198; 2 Story, 383; 1 M'Lean, 18; 1 M'Lean, 35.

IV. The schooner having been seized by the state officer *in rem*, to enforce a lien given by the state law, the marshal had no power to take it from the custody of the sheriff. *The Robert Fulton*, 1 Paine C. C. R. 620; *Davis v. A New Brig*, 1 Gilpin, 478; *Pulliam v. Osborn*, 17 How. U. S. 471; *Taylor v. The Royal Saxon*, 1 Wallace, 311, 325, 326, 327, 329.

V. The Michigan statute is not repugnant to that provision of the constitution of the United States, which gives the federal courts cognizance of all cases of admiralty and maritime jurisdiction.

(1) Cases of admiralty jurisdiction, are to be governed by the general admiralty law, which is a branch of the law of nations, not the local law of any particular country. See Flander's Admiralty, §§ 1 and 3; 3 Story's Com. U. S. Cons. 1664-7, and notes, 1748; 1 Kent's Com. 377, note; 6 How. 844; *N. J. Steam Nav. Co. v. Merch. Bank*, opinion of NELSON, J., p. 392. Whereas the statute in question is a mere local law, operating only within the state, and between its citizens, involving no matters of national nature. See 3 Story's Com. 1770. Any state, by virtue of its inherent sovereignty, may pass and enforce such a law, to operate upon its own citizens. Riggs, a citizen of Michigan, is bound by that law; he comes into this court claiming under it, he must take it *cum onere*.

(2) State laws similar to this, existed in most of the states previous to the adoption of the constitution, and have ever been sustained. See Story's Com. Const. 1748.

(3) These local laws have been recognized and sanctioned by the United States courts. *Bark Chusan*, 1 Story, 455 (see p. 462), *Davis v. A New Brig*, p. 483; *Pullian v. Osborn*, 17 How. U. S. 475; *The Robert Fulton*, 1 Paine, C. C. R. 620; 3 Story's Com. Cons. §§ 1665, 1666, and note 3; 1 Kent, 377, and note; *Hobart v. Drogan*, 10 Pet. 108, 120; *The Toronto*, 12 Law Reporter, p. 11, SPRAGUE, J.

(4) Congress has recognized expressly the existence and legality of these laws. Act of 26th of February, 1845, see Const. p. 4.

(5) The courts of Ohio decided as we contend. *Thompson v. Morton*, 1 Warden, 22 Ohio Rep. (Vol. II, N. S.), 26, 28, 29 *Keating v. Spink*, 3 Ohio State R. 105, 116, 117.

(6) This is a matter of great delicacy, and no state law should without strong reason, be declared unconstitutional. *Fletcher v. Peck*, 6 Cranch, 87, 128.

VI. We do not claim that the Michigan statute has any force beyond the limits of the state, or that it is binding upon foreigners. The question which has been so much mooted, whether a sale under this statute divests the lien of foreigners, does not arise here. Riggs, the original owners of the schooner Ladue and O'Callaghan, are all citizens of Michigan.

A. *Russell*, for libellant in reply.

I. It is incompetent, in this *collateral proceeding*, to impeach the decree of the District Court in the first suit, and the evidence offered by respondent is inadmissible. See, as to nature of proceedings *in rem*, *Kennedy v. Georgia State Bank*, 8 How. 644; 2 Am. Lead. Cas. 564-8; Story Confli. § 592; 9 Geo. R. 244, 247.

II. The acquiescence of the creditors pursuing their remedy in the state courts, without interposing any claim pending the proceedings in the District Court, is a waiver and relinquishment of their acquired rights. Conk. Ad. 548; *George v. Skeates*, 10 Ala. 741; 1 Paine C. C. R. 625.

III. The admiralty acquired complete jurisdiction by the

The Schooner John Richards.

seizure made by the marshal, the vessel not being in the custody of the sheriff at the time. *Brig Ann*, 9 Cranch, 289; *Josefa Secunda*, 10 Wheat; *Ross v. Himely*, 4 Cranch, 241; *Hudson v. Questier*, 4 Cranch, 293. Continued possession is necessary. *Bridge v. Wyman*, 14 Mass. 195; 1 U. S. Dig. 313; Conk. Ad. 494; *Dunklee v. Fales*, 5 N. H. 527; *Bagley v. White*, 4 Pick. 395; *Burrough v. Wright*, 19 Vt. 510; *Sch. Bolivia*, 1 Gall. R.

IV. Granting that the state court acquired and retained jurisdiction and possession of the *res*, it is not, therefore, withdrawn from the jurisdiction of the United States Admiralty. The marshal, under admiralty process, could remove it from the custody of the sheriff. *Greenough v. Walker*, 5 Mass. 215; *Watson v. Todd*, 5 Mass. 274; *The Spartan*, Ware, 149; Conk. Ad. 407, *seq.*; *The Taranto*, 12 Law Rep. 13 (Boston); *Certain logs of Mahogany*, 2 Sumner, 589; *The Flora*, 1 Hagg. Ad. R. 298; Conk. Ad. Prac. 553; *Taylor v. The Roy. Saxon*, 2 Am. Law Reg.; *Same Case*, 1 Wallace, jr. 311; *Harris v. Dennie*, 3 Pet. 292; *U. S. v. Bags of Coffee*, 8 Cranch, 398; *The Florenzo*, 1 B. & H. 65.

V. Proceedings under the Michigan statute, chap. 122, are not *in rem*. If it was, all the world would be bound. Sm. L. Cas. 536. But a foreign lienholder cannot proceed under it. *Bidwell v. Whitaker*, Man. Mich. R. 464. All the world are parties to a proceeding *in rem*, and the decree concludes all outstanding interests, because all are represented. But in the state court all are not represented. *White v. Maxwell*, opinion of Judge WHIPPLE, Sup. Ct. Mich. 1855 (reporter's note to 20 Ohio Rep. 54 gives a history of legislation and decisions in Ohio). A judgment under the Ohio law not a bar to a suit in admiralty. *The Globe*, 13 Law Rep. 488; Ben. Ad. §§ 364, 365, 434; *The May*, 9 Cranch, 144; *The Mary Ann*, Ware, 105; *The Nep. Ins. Co.*, 1 Sumn. 600; *The Sea Bird v. Behler*, 12 Mis. 569; 13 Wend. 607; 12 Mass. 291-5; Curtis R. 259; *The Henrietta*, U. S. D. C. Missouri; [1] *Bags of Coffee*, 8 Cranch. A judgment, even of the state court, would be no bar. 2 Am.

[1] This case will be found under the decisions of Judge WELLS, of Missouri, in this volume, p. —, reported in full.—EDITOR.

L. Cas. 720; *D'Arcy v. Ketchum*, 11 How. 165; 13 Pet. 312; *Ewers v. Coffin*, 1 Cush. 24.

VI. If the Michigan statute authorizes a proceeding *in rem*, it is so far *unconstitutional and void*.

(1) As impairing the obligations of contracts. *Bronson v. Kenzie*, 1 How. 311; *McCracken v. Howard*, 2 How. 608; *The Chusan*, 3 Story, 462, 464.

(2) Because it attempts to confer upon a state court a jurisdiction appropriated by the United States courts and laws to the Federal courts. *Waring v. Clarke*, 5 How.; *N. J. St. Nav. Co. v. Merch. Bank*, 6 How. (overruling *The Thos. Jef.* 10 Wheat., and the *Steamboat Orleans*, 11 Pet.), and *The Gen. Chief*, 12 How., settle the doctrine that public navigability is the test of jurisdiction. See also 1 W. & M. 412-418, 421, 439, *New Bedford Bridge Case*; & 12 Conn. 7. As to exclusive regulation of commerce, *Haldimand v. Beckwith*, 4 McLean, 203; *Sch. Ellen Stewart*, 5 McLean; *Campbell v. Emerson*, 2 McLean, 33; *Rogers v. Cincinnati*, 5 MeL. 358; Madison Papers, 91-105, Vol. II, 743, 744; 2 Dall. 419. As to constitutionality of these state laws, see *Globe Case*, *ubi supra*; 8 West. Law Jour. 241; 3 West. Law Jour. N. S. 41; 2 do. 530; 1 Kent's Com. Vol. VII, 412, 413, and notes; *Ibid* 403, note 1; Story Const. § 1663-1675; Federalist, No. 80; Conk. Pr. 147, 180; *De Lovio v. Boit*, 2 Gall. 481; Gilpin, 481. As to saving common law remedy, 2 Paine C. C. R. 186, 143; *Sch. Wave v. Hyer*, 1 Wheat. 337; 6 How. 390; 12 How. 459.

WILKINS, J.—The libel in this case seeks to regain the possession of the vessel, and sets forth a title under a bill of sale from the marshal of this district, dated the 24th of December, 1855.

The vessel was originally libeled in this court by one John Riggs, for supplies, pending which, and before the vessel was seized by the marshal, John Brayman, of Ohio, filed his intervening libel for materials furnished.

The vessel was taken possession of by the marshal, September the 8th, 1855, and according to the testimony, when she was anchored at a private wharf, under the custody of state process.

The Schooner John Richards.

The return of the marshal shows that "he held her in custody." The suit in this court proceeded to decree of condemnation, under the usual notice and proclamation. No claim was interposed, and the vessel was regularly sold on the 24th of December last.

The respondent claims under a bill of sale emanating from the sheriff of Wayne county, the vessel having been sold by him under process issued by a circuit court commissioner of the state, on the same day with that of the marshal, who testified that no one was in possession when he seized; and that he had not been notified of any seizure by the sheriff, other than rumor; and that, subsequently, he and the sheriff agreed to hold possession together until the controversy in regard to title should be settled by the court; the admiralty sale being postponed until after the sheriff's sale.

The principal question presented by this state of facts, disregarding the testimony as to the actual custody of the vessel by the sheriff at the time of seizure by the marshal, is, as to the paramount and exclusive jurisdiction of the courts of the United States in all admiralty and maritime causes. The proceedings of the state commissioner cannot be considered as proceedings *in rem*. Such proceedings bind all the world, and as was recently held by the Supreme Court of this state in the case of the *People v. Hibbard*—"on the principle of constructive notice to all the world." But, the Michigan statute, for the collection of demands against ships, boats and vessels, and declaring liens thereon for supplies and materials, makes no equal provision for the recovery of claims arising in other states, and postpones the rights of the foreign creditor to those of its own citizens.

It is certainly not inconsistent with the judicial power as defined by the constitution of the United States, for the state to create a maritime lien, unknown to the general maritime law, and to provide legal tribunals and a mode of procedure for the enforcement of such liens, other than proceeding *in rem*, which is peculiar to admiralty, and cuts off all foreign claims, and in its consummation, confers an indefeasible title in the vendee to the *rem*, against all the world. Such a proceeding is international—not municipal. But, wherein the latter appropriates

the remedy *in rem*, it comes in direct conflict with the second section of the third article of the constitution of the United States. For if jurisdiction extends to all cases of admiralty and maritime character, and this proceeding is of that character, designed to embrace all the world, the subject, in that respect, is excluded from state legislation, which has no power to divest a lien existing in admiralty, the states having conferred upon the national government the entire jurisdiction. The possession of the vessel by the sheriff under the state process, did not divest the lien in admiralty, or affect the process in the hands of the marshal.

The case of the *Royal Saxon*, 1 Wallace, 325, is directly in point. She had been attached by the process of replevin under the state statutes, a week before she was libeled in admiralty in the District Court by a material man. The marshal made a special return, stating that he found the sheriff of the county on board, who had made a previous levy under the state process. The marshal's return was made the basis of the further proceedings in admiralty, and the vessel was sold under the decree of the United States court, which was affirmed on appeal; Mr. Justice GRIER holding, that the jurisdiction of the admiralty was exclusive, as to the proceeding *in rem*, and that the title of the marshal's vendee was good against all the world: that the admiralty lien adhered to the vessel, from the moment the debt was contracted; and that the sheriff's vendee bought the vessel with the full notice of the proceedings instituted for its enforcement; and as between him and the marshal's vendee, his title is divested as completely. (in the language of Judge GRIER) "as if he had bought lands on execution, which were afterwards sold on a mortgage, which was the oldest lien on the property."

My attention has been called since the argument by the respondent's counsel, to a recent decision in the district of Missouri, with the remark, that the opinion of the court sustained the doctrine, that the sheriff's sale divested the liens of all citizens of the state. Such is not my reading of the opinion of Judge WELLS, and if such was the case, the doctrine is not consistent with the character of a maritime lien, which certainly may be acquired by as citizen of the state as well as by a foreigner.

Judge WELLS expressly held, that the state could pass no law

The Steamboat Forrester.

and create no process, which would divest a lien existing in admiralty, and that a sheriff's sale could only divest the owners, and others, residing in the state, of their interest in the boat, on the ground of notice; but, as to foreign creditors who had acquired liens in admiralty, they could in no way be prejudiced by a sheriff's sale. And the same principles have been held in the eastern district of New York, Judge BETTS holding (1 Blatchford & Howland, 65), "that the possession of property by a sheriff, under a *fi. fa.*, cannot exclude the marshal from taking possession under the process of the United States court.

The fact in this case, that Riggs, who filed the original libel for supplies, was a citizen of the state, could not of itself possibly affect his lien, and certainly not that of Brayman, the intervening libellant, a citizen of Ohio, acquired antecedent to the service of the state process.

It is unnecessary to discuss the subject further, as the point involved, is deemed by the solicitors so important, that no doubt an appeal will be taken to the circuit for further adjudication.

Decree for libellant.

NOTE.—This case was taken by appeal to the Circuit Court of United States, and the decree of the District Court affirmed. The decision of this case on appeal will probably be found in the next volume of M'Lean's Reports, which will be Vol. VII.—
EDITOR.

THE UNITED STATES *v.* THE STEAMBOAT FORRESTER.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. A distinction exists, in the navigation laws of the United States, between registered vessels and vessels enrolled and licensed for the coasting trade, as regards penalties imposed.

VOL. I.

The Steamboat Forrester.

2. On the transfer of a registered vessel to a citizen of the United States she must be registered anew, or she loses her privileges as an American vessel; but a different penalty is imposed by the enrolling act for a neglect to renew a license granted by virtue of that act.
3. Where a vessel has been enrolled and licensed, and prior to the expiration of the time limited by the license is sold to a citizen of the United States, and continues running without a renewal of her license, she becomes liable to port fees and tonnage in every port at which she may arrive, the same as vessels not belonging to the United States; but the vessel does not thereby become denationalized.
4. The existence of a custom under which purchasers of vessels previously enrolled and licensed have awaited the expiration of the time limited in the license before obtaining a renewal of the same, would not relieve such vessels from liability to the penalty provided by the enrolling act.
5. Custom will not modify an act of Congress.
6. The laws of the United States in relation to commerce and revenue use the word "import" in its commercial sense.
7. The importation of merchandise into the United States implies bringing the goods and productions of other countries into the United States from a foreign jurisdiction.

THIS was a libel of information filed on behalf of the United States, claiming a condemnation and forfeiture of the steamboat Forrester, her tackle, apparel and furniture, to the government for an alleged violation of the revenue laws. The Forrester had been duly enrolled and licensed for the coasting trade, while she was owned by E. B. Ward, a citizen of the United States. A short time after her license had been obtained she was sold by Ward to one Clement, who was also a citizen of the United States. Clement neglected to renew the steamer's license, for the reason, as it would appear, that a custom prevailed on the western lakes and rivers of allowing vessels once enrolled and licensed to run until the expiration of their license, without regard to any change of ownership that might occur during the life of the license. It was claimed on the part of the government, that by the neglect of the purchaser to renew the vessel's enrollment and license, she ceased to be a vessel of the United States. The Forrester was engaged in the carrying of passengers and freight between Lexington and Detroit, in the state of Michigan, stopping on her trips at various ports in Canada, as well as in Michigan. On one of her trips from Lexington to Detroit, she took on board, at ports in Michigan, a quantity of

The Steamboat Forrester.

shingles, wool and fish of the value of more than four hundred dollars, and carried the same to Detroit, where they were landed without a permit from the custom-house officers. On her voyage she touched, as usual, at Canadian landings, having the articles in question on board. It was insisted on behalf of the government, that this was an importation of merchandise into the United States from a foreign country, and that, as the Forrester had lost her American character by failure to obtain new license, after sale, such importation worked a forfeiture of the vessel to the government of the United States, under the provisions of the act of Congress of 1817.

Hon. George E. Hand (district attorney), for the United States.

I. By the neglect to renew the registry of the Forrester, after sale, she ceased to be a vessel of the United States. Act 1792, § 14, cited in 1 St. at Large p. 294. See this doctrine fully illustrated in *United States v. Willings*, 2 Peters' Cond. 20, 23. True, this act speaks of registered vessels, but vessels enrolled and licensed under act of 1831 (Gord. 773, 4 St. at Large, 487, § 3) are liable to the rules and regulations and penalties relating to registered vessels, and such is the construction held by the treasury department. As to what constitutes a United States vessel, see Act 1792, § 1, 1 St. at Large, 287, 288; Gord. 713, § 2478. No other vessels are qualified for the coasting trade or fisheries. The act of 1792, § 4 (Gord. 715, § 2484, 1 St. at Large 289), shows what is necessary to obtain a registry; and like qualifications and requisites are necessary for the enrollment as for the registry of vessels. See Act 1793, § 2, 1 St. at Large 305; Gord. 771, § 2678. The Forrester having thus lost her American character by failure to obtain new license after her sale to Clement, and not being a vessel of any other country, by the act of importation of goods into the United States from Canada, a foreign province, became forfeited to the United States by Act of 1817, §§ 1, 2, 3 St. at Large, 351; Gord. 713, §§ 2475-6.

II. Was there an importation of goods by the Forrester? She came from a Canadian port into Detroit with goods on board. It may be said that there is evidence, on behalf of the claimant,

that the goods in question were all shipped from American ports. If that were so, it would not save the forfeiture of the vessel. The goods were imported from Canada into the United States by the Forrester, she not being a vessel of the United States at the time. A voluntary bringing from a foreign country is an importation. 1 Gal. 244; 8 Peter's Cond. 299; 1 Mason, 499; Dunlap's Adm. Pr. 245. The act of Congress of 1848 (9 St. at Large, 232; Gord. 770), evidently contemplates that every bringing of goods from a foreign place is an importation, and contains important provisions based on that assumption, as, for example, that foreign goods, on which duties have once been paid, should not, if shipped at an American port in a vessel that touched at a foreign port, thereby again be made to pay duty. If the goods were brought from Canada into the United States it is quite immaterial how the goods came to be in Canada. In whatever way they came to be there, they are, nevertheless, goods imported into the United States from a foreign place, not in a vessel of the United States or of Great Britain, within the act of 1817. The statute makes no distinction in favor of goods of American growth or origin. Whenever a distinction between goods of domestic and foreign production was intended, it is expressed in the statutes. Thus, in act of 1793, § 6 (1 St. at Large, 307), a vessel offending having domestic goods or products on board, is exposed to tonnage duties, but if the goods are of foreign growth or production the vessel is forfeited. The act of 1831, § 8 (4 St. at Large, 487), uses the disjunctive *or*, and authorizes a vessel, under the same papers, to be employed, "either in the coasting *or* foreign trade," but does not authorize a vessel to be engaged in both trades at the same time; and trips made under that act to and from American and Canadian ports, are strictly foreign voyages, and must be conducted as such; and goods taken from an American to a Canadian port, and thence returned to an American port, must be treated the same as goods taken from New York to Liverpool and thence back to New York. The act of 1848, for the first time permitted the same vessel to be engaged, at the same time, in coasting and foreign trade, and that only on compliance with the proviso in the 1st section of the act. And this act treats every vessel that has "touched"

at a foreign port as coming from a foreign voyage, for she must conform to the laws touching manifests of cargo and passengers, "and all other laws regulating the report and entry of vessels from foreign ports, and be subject to all the penalties therein prescribed." And in case a vessel does not comply with the terms of the proviso to section 1, she enjoys no privilege under this statute. The second section of this act provides that all vessels and their cargoes engaged in the trade referred to in the act, "shall become subject to existing collection and revenue laws, on arrival at any port in the United States." Such an arrival is clearly treated as an arrival from a foreign port, and "the collection and revenue laws" referred to, are none other than the existing collection and revenue laws pertaining to foreign trade; and it is to save certain classes of goods from the operation of "existing collection and revenue laws," to which they are made subject by the first clause of said second section, that the proviso thereto is introduced, saving those from import duties, to which, without such proviso, the "existing collection and revenue laws" would have subjected them. The "touching at foreign ports," alluded to in this act, is evidently intended as equivalent to entering a foreign port for the purpose of landing, and taking in thereat, merchandise, passengers, &c., which is making port for all commercial purposes, as fully as though such port was the only port of destination; and the arrival of a vessel from a foreign port so "touched at," is treated by this statute throughout as an arrival from a foreign country, and the cargo brought in such vessel is treated as imported from a foreign country and made subject (except when saved by the proviso to the second section) to the collection and revenue laws applicable to cargoes imported from foreign countries. The fact that the Forrester made certain Canadian ports, for all commercial purposes mentioned in the statutes, must, upon her departure thence and arrival in a port of the United States, bring her cargo within the statute definition of "imported;" and this, more especially when she came from a foreign, to a port of the United States, without the privileges conferred by the act of 1848.

III. The bringing into the United States, by a vessel, from a foreign port, goods of the value of \$400, and landing the same

without a permit, is a distinct cause of forfeiture from the last, whether the importation be in American or foreign vessels, and whether the goods be dutiable or free. See act of 1799, § 50, 1 Statutes at Large, 665. The language of this statute is very explicit. The bringing from a foreign place and landing without permit, covers the whole ground.

John S. Newberry, for the claimant.

The act of 1792, § 14, cited for the government, refers to registered vessels, and so far as this statute is concerned, it is sufficient to say that the *Forrester* never was a "registered" vessel. She is an "enrolled and licensed" vessel; and there is a broad distinction running through the laws in relation to the two classes of vessels. Assuming that the *Forrester* was subject to the act in relation to "registered" vessels, the district attorney, in support of his proposition, that a new registry must be obtained, at the time of the vessel's transfer, cites the case of the *United States v. Willing*, 2 Peters' Cond. 20. This case, however, only decides that a new registry shall be taken out "within a reasonable time," and the facts of each case must decide what is the "reasonable time," and we insist, in behalf of the *Forrester*, from the evidence in the case, that her new papers were taken out within a reasonable time after the transfer.

In order to connect "enrolled and licensed vessels," with the act of 1792, the act of 1831, (4 St. at Large, p. 487), is cited. This act provides that a vessel enrolled and licensed on our northern frontier, "shall be liable to the rules, regulations and penalties, now in force, in relation to 'registered vessels,' on our northern, northeastern and northwestern frontiers." Now, we ask, what are the regulations in force on the frontiers described in relation to registered vessels? There are none. See Conklin's Practice, 329, edition of 1842. On page 230 of the same book, two instances are cited to show that "enrolled" vessels, and "registered" vessels are not subject to the same provisions. There being no laws in force as to registered vessels on our northern, northeastern and northwestern frontiers, except certain general laws which are of no importance in this case, we must look to other sources for the regulations in reference to en-

The Steamboat Forrester.

rolled and licensed vessels. The license itself shows under what laws the vessel is enrolled and licensed; they are the enrolling act of 1798, one passed in 1831, &c., &c. The Forrester was authorized to run under those acts, and in them are contained the regulations and penalties to which she is subject. In none of the acts referred to in the license, is there any provision that a transfer of a vessel, accompanied with an omission to take out new license, causes the vessel a forfeiture of her American character. There is a provision, however (§ 5, Act of 1798), that by such transfer the license becomes void; and section 6 of the same act then provides that a vessel trading without license, becomes subject to port and tonnage duties, but this is the only penalty. Again, section 2 of enrolling act (1 St. at Large, 308), is cited on behalf of the government, which provides that vessels to be enrolled shall possess the same "qualifications and requisites" as are necessary for vessels to be registered. Now, this section does not enact that the licensed vessel shall be subject to all the "provisions" governing registered vessels. It simply refers to the qualifications, character, &c., of the vessel, prior to the enrollment; it has no reference to penalties, rules, &c., after enrollment.

II. The Forrester is charged with "importing goods contrary to the true intent and meaning of the act of 1817;" she is charged with "importing goods from a foreign country." It matters not what may have been the character of our vessel, unless we have been guilty of "importing goods," thereupon, "from a foreign country contrary to the true intent and meaning of the act of 1817." We leave the meaning of that sentence to its usual, simple and commercial construction. We leave it for the court to decide, whether, under the facts of this case, there was an importation from a foreign country, in the true intent and meaning of the act of 1817, on board the Forrester, or not. She had the right to touch at foreign ports. 9 St. at Large, 232. This is conceded on behalf of the government; and it is also conceded that Congress, in its legislation, has acted upon the supposition, that domestic goods might go into a foreign port, and be afterwards landed in American ports, without being liable to duty. Why, then, should we be con-

The Steamboat Forrester.

demned for acting under the same inference and supposition as Congress itself? We contend, 1st, That by no act on the part of the Forrester, has she lost her American character, or the privileges of an American vessel. 2d. We have not been guilty of importing goods from a foreign country, contrary to the true intent and meaning of act of 1817.

WILKINS, J.—This steamer was seized by the collector of the port of Detroit, for a violation of the revenue laws, on the 18th of October, 1854. The libel informs the court, that, at the time of the seizure, "she was not a vessel of the United States; nor a foreign vessel belonging to citizens of the country from which the merchandise imported in her, at the time of seizure, were first shipped for transportation, or, of the growth, production or manufacture of that country." And also, "that her cargo, consisting of ten barrels of fish, 128 bunches of shingles, and twenty-five bales of wool, being merchandise subject to duty, was brought and imported from a foreign place, viz: the province of Upper Canada, into the United States, at the port of Detroit."

The answer of S. Clement, claimant, denies the allegations of this information, both as to the character of the vessel, and the importation charged, and sets forth: that she was at the time, duly enrolled and licensed at the port of Detroit, and that the merchandise specified was not imported into the United States from a foreign place, but was shipped from ports and places within the United States.

It was in proof, on the trial of the issue, thus made in the case: that the Forrester was built at Newport, in this state, by E. B. Ward, in the month of June, 1854, and was by him enrolled and licensed for the coasting trade, on the 6th day of July following, "for one year from that date": that on the 12th of July of the same year, only six days subsequent to her enrollment, Ward sold the Forrester to Clement, the conveyance being witnessed by the deputy collector of the port of Detroit, and placed on record in a book in the office, provided for that purpose, called Vol. A, on page 534: that Clement, the claimant of the Forrester, was at the time, and is still a citizen of the United States: that during the summer of 1854, the route of

The Steamboat Forrester.

the Forrester, in navigating the rivers Detroit and St. Clair (a line through the middle of which streams constitutes the national boundary line between the Canadas and the United States), was from Port Huron, St. Clair county, to the port of Detroit: that in her trips she always touched at Port Sarnia and at Baby's Point, villages in the province of Canada, on the east bank of the St. Clair river, for the reception of passengers, baggage and whatever freight might offer: that on her downward trip from Port Huron, on the 18th of October, 1854, the fish specified in the libel, was shipped from Port Huron, the wool from St. Clair, and the shingles from Lexington, all consigned to the port of Detroit; these ports being American ports, within the United States: that on the said downward trip, she stopped, as usual, for freight and passengers, at Ports Sarnia and Baby's Point, but took no freight in at either of those places; and that the fish, wool and shingles were not taken from the Forrester from the time they were shipped until they were landed at Detroit; but remained in the hold of the vessel, the steamer only remaining for a few minutes at the Sarnia and Baby wharves, and on the trip in question receiving no additional freight at those ports: that no other freight was landed at Detroit on the 18th of October, 1854, from the steamer, but the enumerated articles described in the libel: that no new license was taken out for the Forrester by Clement, the purchaser from Ward, nor had she been enrolled since the sale; but shortly after the vessel had been seized, Clement called at the custom-house and made application for a new license and enrollment, which was then refused.

With this demonstration in support of the answer, the government seeks the forfeiture of the goods and the vessel, on two grounds.

1st. That the steamer forfeited her American character and lost her privileges as an American ship, in consequence of the neglect to enroll her anew after her sale to Captain Clement.

2d. That her cargo, landed and seized at Detroit, was merchandise imported from the adjacent province of Canada.

There is a very obvious distinction made in the law regulating the collection of the revenue of the United States, between

registered vessels and vessels licensed and enrolled. The first class is governed by the act of December 31st, 1792, entitled "An act concerning the registering and recording of ships or vessels," and its provisions were designed to apply to vessels engaged in foreign commerce. The second class is governed by the act of the 18th of February, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," and the various subsequent statutory amendments, embracing only vessels in the coasting trade on the Atlantic, and on the northern, northeastern and northwestern frontier waters of the United States. Both statutes were enacted during the same session of Congress; and both classes of vessels are restricted, by their respective certificates of registry, and their licenses of enrollment, to the species of navigation and trade described and defined in these documents respectively.

But it is contended that the second section of the enrolling act adopts the provisions and penalties of the registry law. In many respects the two statutes differ, and such enactment, on the very threshold of the statute, if so construed, would render much of the remaining thirty-two sections nugatory and unnecessary. For instance—by the sixteenth section of the registry law, the failure to report a sale to a foreigner works a forfeiture of the vessel; and by the thirty-second section of the enrolling act, the sale of a licensed vessel to a foreigner, whether reported or not, absolutely forfeits the vessel and her cargo. The provision is positive, "if any licensed ship or vessel shall be transferred to any person not a citizen of the United States, the vessel and her cargo shall be forfeited." Here the penalty is imposed on the forbidden act; while in the sixteenth section of the registry law the penalty attaches, not to the act of sale, but "on the neglect to make the same known" in the way indicated in the act. The same penalty is applied, but not under the same circumstances; the sale in the first being the penal misconduct, and the failure to report, the cause of forfeiture in the other. It is considered, therefore, that the provision of this second section of the enrolling act, is merely directory to the public functionary by and before whom the enrollment is to be

The Steamboat Forrester.

made, as preliminary to the grant of the license. This is clearly inferable from the language employed. The section declares that "in order for the enrollment of any vessel, she shall possess the same qualifications, and the same requisites in all respects, shall be complied with, as are made necessary for registering ships by the registry law; and the same duties are imposed on all officers, with the same authority, in relation to enrollments, and the same proceedings shall be had in similar cases touching enrollments."

The same qualifications, the same requisites in all respects, and the same proceedings in similar cases, are directed to be observed; but which by no means embrace the penalties of the first act, as applicable to the cases of dereliction enumerated in the second. By the first law, on certain pre-requisites, a certificate of registry is to be given: and by the second, on the performance of similar acts, an enrollment is perfected, and a license obtained. But certainly it would be a forced construction so to interpret these words as to make the penalty prescribed on the omission, under the first statute to re-register, apply to the neglect to re-enroll and re-license.

The 14th section of the registry law directs, "that when any ship or vessel, which has been registered, shall be sold to a citizen of the United States, the said ship must be registered anew by her former name, otherwise she shall cease to be deemed a ship of the United States. And in every case, if she shall not be so registered anew, she shall not be entitled to the privileges of a vessel of the United States."

And the sixth section of the enrolling act, provides that, "every ship found trading between different places in the same district, without enrollment or license as provided in the act, shall pay the same fees and tonnage in every port at which she may arrive, as vessels not belonging to citizens of the United States."

Where a vessel has once been enrolled and licensed, and before the expiration of the time limited in the license, is sold to a citizen of the United States, and continues running without a renewal, she certainly occupies in relation to the law, the position indicated, of "a vessel trading without enrollment or license

The Steamboat Forrester.

as provided in the act," and is amenable to the special penalty imposed, but to no greater. But "ceasing to be a vessel of the United States," and losing all the privileges of such, as a penalty, widely differs from being made liable to port fees and tonnage at every port she arrives at. In the one case, she loses her national character, and the protection which her certificate affords; in the other, she is made responsive to additional pecuniary obligations.

The object of both statutes, is the protection of the revenue against fraud, to encourage American enterprise, to preserve the rights of the citizen trader, to confine both classes of vessels to the restrictions imposed by their title papers, and to secure the collection of the public dues without confusion; notwithstanding the various transfers to which this species of property is ever subject during the season of navigation.

In the commerce on the ocean with foreign nations; a voyage might continue for a year and more, before a return to the home port. In such cases, greater strictness was deemed essential, than in those of domestic trade on the coast, and on the lakes and rivers of the north, the northeast and northwestern frontier. When sold to a foreigner, the registered vessel, therefore, forfeited her national character, and when sold to a citizen, the same consequence ensued, unless the old registry was surrendered, and the vessel re-registered, according to her change of title. The intention is manifest. Why should a privilege solely conferred upon a citizen, be surreptitiously used with impunity by a foreigner? The same necessity did not exist in regard to the other class; it was not to be presumed that foreigners could successfully compete with citizens in the domestic trade, and the exigency did not demand the forfeiture by the American ship of her privileges of national character.

So far, therefore, as the registry and enrolling statutes are applicable to the question of the penalties imposed by each, no embarrassment is felt in deciding, that the neglect to renew the license, does not denationalize the domestic vessel engaged in the navigation of our inland frontier waters. The question then arises, how far the subject is affected by the 8d section of the act of the 2d of March, 1831, which declares, "that any vessel

The Steamboat Forrester.

of the United States, navigating the waters on our northern, northeastern and northwestern frontiers, shall be enrolled and licensed in such form as may be prescribed by the secretary of the treasury; which license shall authorize the vessel to be employed either in the coasting or foreign trade, and no certificate of registry shall be required for vessels so employed on said frontiers: Provided, that such vessel shall be in every other respect liable to the penalties now in force relating to registered vessels on our northern, northeastern and northwestern frontiers."

Now, this proviso expressly embraces the penalties in force in 1831, relating to registered vessels navigating the northern, northeastern and northwestern frontiers. There is no escape from this conclusion. If then the penalty in question, namely, the forfeiture of national character and privilege, was applied at that time by any known provision of law, to licensed vessels; if this class was then, in that respect, synonymous with the former, this express language must control the court, whatever construction is given to the acts of 1792 and 1793. But, in vain it may be asked to what then existing penalties does the proviso refer? Not to the penalty prescribed in the old registry law; for that only applied to vessels engaged in foreign commerce. Not to any new penalty created since 1792, and prescribed to vessels registered for the inland trade. If so, where are they to be found? Professional research and judicial examination alike fail in their efforts to discover them.

The difficulty can only be solved by that which seems (from taking the whole law into consideration), to have been the manifest intention of this act; and such clearly was, to enlarge in order to meet the growing wants of western commerce, the privileges of licensed vessels navigating the waters which form our northern, northeastern and northwestern national boundary, and enable them to engage in foreign and domestic commerce at one and the same time, under one set of papers, namely the enrollment and license, without the formality of a registry, and not exacting the restrictions, or enforcing the penalties imposed on registered vessels.

The case at bar exhibits the vessel which has been seized, as originally built and owned by a citizen of the United States,

regularly enrolled by him, and having a license procured for the coasting trade covering one year from its date; and that, on the 18th of October, 1854 (a little better than two months after), she was seized for an infraction of the revenue laws, charged with the importation of foreign merchandise from a foreign port. Shortly after her enrollment by her owner, she was sold to the claimant, who was a citizen of the United States, of which sale the revenue officer was cognizant. Her purchaser neglected the renewal of her license, not deeming it necessary, inasmuch as a custom prevailed, for purchasers of such vessels to await the close of navigation before any application for renewal.

Under such circumstances, did this vessel lose her national character as a vessel of the United States? We think not. The registry penalty does not apply. But the penalty directed by the sixth section of the enrolling act, could with propriety have been enforced. The custom alluded to would constitute no defence; it was not a custom but a toleration, and as such was extended by the functionaries of the government to the owners of licensed vessels, but could not modify the law: nor would the time allowed be considered as the "reasonable time" comprehended by Chief Justice MARSHALL in the case of the *United States v. Willings & Francis*.

But, independent of this construction of the navigation acts, the libel must be dismissed, because the facts in proof do not amount to an importation within the true meaning and spirit of the act of March 1st, 1817. That act specifies as an "importation" merchandise brought into the United States from any foreign port or place. The term used is "import" and legislation employed that term in its commercial sense, which is to "bring" from a foreign jurisdiction into this jurisdiction, merchandise not the product of the country. Its commercial meaning is directly contrary to the term "export." Both phrases have a technical meaning in the law. We "import," teas from China, wines from France. We "export" cotton, tobacco, pork and wheat. The one term signifies etymologically "to bring in," the other "to carry out." The act itself defines the word, viz: "brought into from any foreign port or place."

It is in proof that the articles enumerated in the libel, "fish,

Ward v. Thompson.

wool and shingles," were shipped from American ports, within this district, and by respective bills of lading consigned to merchants in Detroit. When the goods were shipped they were stowed away and never removed until they reached their destination. Now, is the meaning of the word "import" to be changed under these circumstances, simply because the vessel freighted with these productions, and engaged in the navigation of the rivers St. Clair and Detroit, temporarily stopped on her downward voyage at Canadian ports for the purpose of receiving in the usual business of a steamer additional passengers and freight, or to take in fuel? Such would not be a fair, just and reasonable construction of the law, the chief intention of which is the imposition of duties, for the support of government, on foreign commerce. The literal signification of the words contained in the law do not admit of such an interpretation; it is contrary to the known policy of the navigation laws.

This libel must, therefore, be dismissed. But although there was no evidence to justify the condemnation of the vessel, yet the seizure was made under circumstances which warranted the suspicion of the officer, that the cargo discharged was imported from Port Sarnia in Canada. The captain called the merchandise "Port Sarnia stuff," and the vessel not having renewed her license under her new owner, and the doubt which existed as to her character, made it the duty of the officer to make the seizure.

Libel dismissed, with certificate of probable cause.

EBER WARD, Libellant v. CHARLES THOMPSON, Respondent.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. W. being owner of the steamboat Detroit, agreed with T. that he might run the boat during two sailing seasons. The boat was to be under the control of T.

Ward v. Thompson.

and he was to appoint all the officers and crew of the boat, except the clerk. The clerk was to be under the control of W. and to make reports to him of the receipts and expenditures of the boat. The receipts were to be applied, 1st, to the payment of the boat's expenses; 2d, to her insurance; 3d, to the payment of \$6,000 to W., and the balance to be divided between W. and T. T. was to be allowed \$300 per annum for his services as agent of the boat. *Held*, that although by this agreement the parties became partners after a certain event, in the profits of the business of the boat, they were not partners to such an extent as to oust the admiralty court of jurisdiction in a cause for the recovery of damages for a breach of the agreement.

2. Where T. was to run the boat of W. for a fixed period, under a special agreement, by the terms of which the earnings of the boat were to be applied, 1st, to payment of the boat's expenses; 2d, her insurance; 3d, a given sum to W., the owner, and the balance to be divided between W. and T.. *Held*, that until the expenses, insurance money and the given sum to be paid to W. were realized, T. was but the bailee or agent of W.
3. At any stage of a proceeding in admiralty, until final hearing, the question of jurisdiction is open.

THIS was a libel *in personam*, promoted by Eber B. Ward, as survivor of himself and Samuel Ward, deceased. The libel alleged that in the month of June, 1852, the libelant and said Samuel Ward, being the owners of the steamboat Detroit, chartered said boat to the respondent, Thompson, for two years, and delivered her to the defendant in good order and condition: that by the terms of the charter agreement the respondent was to run the boat between Pentanguishine and other ports on the Georgian bay, on the east shore of Lake Huron, and Sault Ste. Marie, Michigan, as a passage and freight boat: that the respondent was to employ good, careful and competent officers and men on board the boat, except the clerk, who was to be employed by the Wards: that the clerk was to receive all the earnings of the boat, and after paying her expenses, to remit the first net \$6,000 to the libelant, and also one-half of all her earnings above that sum. The libel then alleges that the respondent did not use said boat as he had agreed to do: that he employed her as a "trading boat," in consequence whereof, the libelants sustained damage to the amount of \$1,000: that he did not employ good, careful and competent men on board of the boat, but the contrary; and that by the carelessness and incompetency of the men so employed, the boat's engine was damaged \$500, and the boat set on fire and

damaged \$1,500, and that the respondent neglected to pay the boat's earnings to the clerk, but used them for his own private purposes, and neglected to account for large sums of money received by him from the Canadian government, on account of the boat, to the libelant's damage \$1,000. To recover these damages the libel was filed. The answer denied that the respondent ever chartered the steamboat, as alleged by the libelant, as also, all and singular the allegations of damages set forth in the libel; and averred, that by virtue of the agreement referred to by the libelant, the respondent had entered into a copartnership with the Wards, touching the employment of the boat for the two years therein mentioned. The agreement was annexed to the answer, and a full statement thereof, so far as essential to the purposes of this case, is contained in the opinion of the court. The answer further averred, that in a suit at law which the respondent had prosecuted against the libelant in the Court of Queen's Bench in Upper Canada, based upon said agreement, the libelant had insisted, by way of defence, that said agreement constituted him a copartner with the respondent: that the defence thus set up by the libelant, was sustained by the Court of Queen's Bench; and that judgment was thereupon entered accordingly, which judgment has never been reversed or set aside. The respondent therefore insisted that the libelant was estopped from denying the copartnership, and that this court has no jurisdiction of the matters in controversy, the same not being properly cognizable in admiralty courts, but rather in the courts of common law and in equity. After the issue had thus been made up, a motion was made to dismiss the libel, on the question of jurisdiction raised by the answer. On the argument of this motion an exemplification of the record of the case in the Court of Queen's Bench, referred to in the respondent's answer, together with a manuscript copy of the opinion of the court pronounced in the case, were presented and read. From these it appeared that the question of copartnership between the parties was not presented by the pleadings, and formed no part of the issue made in the case; but that upon a motion made by defendant's counsel to vacate the judgment, and grant a new trial in the cause, the agreement annexed to the respondent's answer in

Ward v. Thompson.

this suit was read, and it was insisted that this agreement constituted the parties copartners in the boat, and that inasmuch as the greater portion of the plaintiff's claim in that suit, was for earnings of the boat while employed under said agreement, the judgment which had been rendered was erroneous. Of the view taken by the Canadian court upon this motion, sufficient will be seen in the opinion of the court upon the question of jurisdiction raised in the present case.

Lothrop & Duffield, in support of the motion.

Towle, Hunt & Newberry, contra.

WILKINS, J.—A motion is made in this case to dismiss the libel for want of jurisdiction, on the ground that the article of agreement, for the breach of which the libelant seeks to recover damages, was a covenant of partnership.

The answer of the respondent sets forth the agreement, by which it appears, that the libelant and Samuel Ward, now deceased, were at the time of the execution of the agreement, the joint owners of the steamboat Detroit; and agreed "to allow the respondent to run the same between the Sault Ste. Marie and Pentanguishine, during the sailing seasons of 1852 and 1853—in a line with and under the control and management" of the respondent, who was authorized to appoint the officers and crew, with the exception of the clerk, who was placed under the control of the Wards, and was to make reports to them of the receipts and expenditures of the boat every two weeks. The receipts were to be applied, first, to the payment of all expenses for the crew, fuel, repairs and supplies: second, to the payment of the money advanced for insurance: third, to the payment of the sum of \$6,000 to the Wards: and lastly, the sum remaining after these payments was to be equally divided between the parties to the contract; the respondent being allowed, out of the earnings of said boat, over and above the division last specified, the sum of "\$300 per annum for his services as agent of the boat."

Unquestionably this agreement constituted the Wards and the respondent partners in the profits of the business in which the

Ward v. Thompson.

steamer was to be employed. Their interest in the profits or losses of the adventure was joint and of the same nature. But they were not joint owners of the boat, which was, by the express terms of the agreement, chartered to the respondent for the consideration of \$6,000, which was to be paid to the Wards antecedent to any division of the profits. Until that sum was paid we think the partnership did not commence.

This view accords with the opinion of Chief Justice ROBINSON, in the case of *Thompson v. Ward*, decided in the court of Queen's Bench of the province of Upper Canada. In that case, Thompson sought to recover from the Wards, freight and passage money earned by the Detroit "directly after she was chartered by the plaintiff" (Thompson), and to which the defendants (Wards) objected, setting forth this agreement.

The court held, that Thompson could not recover this freight and passage money, because the Wards were entitled to it, not as partners, but as owners of the chartered vessel. Mr. Justice ROBINSON expressly saying, "that this money should go towards liquidating the \$6,000, which would then accelerate the period when Thompson would be entitled to share with the Wards the earnings of the boat, and, in respect to all earned after that period, they would be partners." Such is the language of the opinion.

Certainly, if this freight and passage money had been paid into the clerk's office by a third party, and Thompson could not recover it by suit against the clerk, the Wards could; and if so, the libellant can recover the same from Thompson as part of the consideration agreed to be paid for the charter of the boat.

Until this money was realized by the Wards, to the extent specified by the third clause in the agreement, the fourth constituting them partners, could not operate, and until then, Thompson was but their bailee or agent.

With these views, the court deems it unnecessary to pass upon the proposition stated in the argument, that the construction of the agreement is *res adjudicata*. The records of the Queen's Bench, show that the question was not presented by the pleadings. It arose incidentally, on the statement of counsel, and a verdict was entered, with the understanding, that on the pro-

100 DISTRICT COURT OF THE UNITED STATES.

Ward v. Thompson.

duction of such an agreement as was stated, at a subsequent term, the verdict would be set aside, as to the amount for which credit was claimed. But, as on a careful consideration of the opinion of Chief Justice ROBINSON, I am not enabled to see wherein he pronounces the entire agreement between those parties a covenant of partnership, any further than as to the profits accruing subsequent to the payment of the \$6,000, and concurring therein at present in such construction, it is unnecessary to announce any judgment of this court as to the estoppel of the proceeding here on the part of the libellant. In overruling the present motion I feel less reluctance than I should was this a final determination of the questions raised.

The language employed by the contracting parties certainly rendered the instrument they executed somewhat equivocal. Their intention, though clear as to the "sharing of the earnings," upon a certain contingency, is somewhat obscure as to whether the writing should be considered as a charter party on specified stipulations, or as a covenant of copartnership. My mind is not free from doubt; but as no injustice can arise from the further prosecution of the cause and entertaining jurisdiction, the objections raised will be held under reservation. At any stage of the proceeding, until final hearing, the question of jurisdiction is open; and if, on further and more full consideration of the able argument of the proctor of the respondent, and the cases cited by him, I should see ground to change the opinion now expressed, the proceedings will at once be dismissed. As at present advised I must refuse the motion.

Motion denied.

DWIGHT SCOTT, Owner of the SCHOONER CONSTITUTION, Libel-
ant v. THE PROPELLER YOUNG AMERICA.

*District Court of the United States. District of Michigan. In Ad-
miralty.*

HON. ROSS WILKINS, JUDGE.

1. The district courts of the United States derive their jurisdiction from the constitution of the United States and the acts of Congress made in pursuance thereof.
2. The second section of the third article of the constitution of the United States, which declares that the judicial power of the courts of the United States "shall extend to all cases of admiralty and maritime jurisdiction," embraces those subjects, whether of contract or tort, which, at the time the constitution was adopted, under the general maritime law, were the appropriate subjects of the jurisdiction of admiralty courts.
3. The act of Congress of the 26th of February, 1845, did not enlarge the jurisdiction of the national courts as to questions of admiralty.
4. The term "navigable waters," used in the act of Congress of 26th February, 1845, is not to be understood in the same sense as "natural streams;" and must be held to include an artificial communication such as the Welland canal.

THE libel in this case was filed by the owner of the schooner Constitution to recover damages resulting to the schooner from a collision with the propeller, in the month of August, 1855, while the schooner was lying windbound in the Welland canal. The usual allegations of carelessness and negligence on the part of the libeled vessel were contained in the libel. At the time of the collision the schooner was bound with a cargo of coal, upon a voyage from Erie, a port on the south shore of Lake Erie, in the state of Pennsylvania, to Toronto, a port on the north shore of Lake Ontario, in the province of Upper Canada. The Welland canal is the only navigable water communication between Lakes Erie and Ontario. No appearance having been made on behalf of the propeller, her default was entered and the libel taken as confessed. A motion was subsequently made, in behalf of the American Transportation Company, owner and claimant of the propeller, to set aside the default and order *pro confesso*, and for leave to file an answer. This motion was urged

on the sole ground that the court had no jurisdiction of the cause, inasmuch as the collision alleged did not occur either "upon the lakes, or the navigable waters connecting the lakes." To sustain this position it was contended that the Welland canal, being an artificial communication, was not "navigable water," within the meaning of the act of 1845.

Jacob M. Howard, in support of the motion: The tort complained of was not committed on the lakes, nor on any of the waters naturally connecting them. To apply the jurisdiction given by the act of 1845 to every case arising upon waters which may form an artificial communication between the lakes, would be to give the admiralty jurisdiction of any contract or tort that might arise upon a canal connecting Lake Michigan with Lake Huron, Lake Erie or Lake Superior; or connecting Lake Huron or Lake Erie with Lake Ontario, through Canada, no matter in what circuitous route that connection might be made. It could not have been the intention of Congress to confer such a strange and anomalous jurisdiction upon the district courts.

It will, of course, be conceded that the court could not take cognizance of a case arising upon a stream from the interior of Michigan into Lake Erie, nor of one arising upon a stream flowing from the interior into Lake Michigan, for the reason that neither stream would be water connecting two lakes. But the construction claimed by the libellant in this case would give the court jurisdiction upon both streams the moment an artificial channel capable of navigation should connect those streams at their fountains in the interior. It is submitted that the powers of the court cannot depend upon any such uncertain and contingent circumstances, and that the "navigable waters connecting the lakes," contemplated by the act of 1845, must be such waters as are made navigable by nature; otherwise almost any canal connecting the navigable waters, would furnish ground of jurisdiction. No statute of the United States has ever applied the term "navigable waters," to an artificial channel or canal, but only to natural streams capable of being navigated. See *Benedict's Adm.* § 286, and statutes there referred to. At the common law rivers were held to be navigable only up to the head of tide-

water. 1 Eng. C. L. R. 240; 5 Pick. 199; Angell on Water-courses, § 545. It is submitted that the words "navigable waters connecting," &c., mean natural, and not artificial channels, and that as the tort complained of by the libellant is alleged to have occurred on the Welland canal, it is not cognizable by this court. The navigable waters connecting the lakes are well known—they are the rivers St. Marie, St. Clair, Detroit and Niagara—all well known channels of navigation, as well known as the Straits of Gibraltar, the Bosphorus and the Dardanelles. These "navigable waters" must be taken to limit the extent of the jurisdiction of the admiralty in the same manner as it is limited by the phrases "high seas," or "tide water," in cases arising in the ocean. In such cases the jurisdiction is determined by the place where the cause of action arises; and if it arise within the body of the county the admiralty has no power to redress the wrong. Conkling's Adm. 22, 23, &c.

H. K. Clark, contra.

The jurisdiction of this court, in admiralty, in cases of tort, does not depend upon the place where the tort complained of was committed, but upon the employment of the vessel concerned. The act of Congress of 1845, on this point, requires that the vessel be "employed in the business of commerce and navigation between ports and places in different states and territories, upon the lakes and navigable waters connecting said lakes." The questions to be determined on this motion are, 1st. Was the Constitution employed in the manner contemplated by the act of 1845, when the alleged tort occurred? 2d. Does the tort "concern" her? The answer proposed to be filed does not deny either of these questions; but seeks to set up, by way of plea, the simple alleged fact that the place where the tort was committed was within the body of a county within the British dominions. Jurisdiction in our courts extends to everything which the authority establishing the courts enacts. It might have made the place where a contract was made, or tort committed, the test of jurisdiction; but it has not done so. It is not torts committed in such and such places, or in a particular manner, which this court is limited to adjudicating; but torts concerning

such and such vessels, while engaged in a particular employment. It is asserted by the respondent, as a fact, that the collision occurred within the limits of a British county, and therefore this court is ousted of jurisdiction. Will not this fact, if available for this purpose, be also available to defeat the jurisdiction of this court in every case where the Welland canal must be employed? This canal is indispensable for the commerce between Lakes Erie and Ontario. If the canal is "navigable water" within the meaning of the act of Congress, as regards contracts relating to that commerce, there exists no reason why it should not be so considered as regards torts. If it is not "navigable water," then the provisions of said act do not apply to commerce and navigation between those two great lakes.

It will not be insisted that the cause of action in this case is in the nature of an intransitory action, which cannot be brought in a jurisdiction foreign to that wherein the cause of action arose. This is sufficiently met by the case of *Smith v. Cowdry*, 1 Howard, 28. The ground must be, if sustained at all, that the cause of action having occurred "within the body of the county," it is not merely without the jurisdiction of this court, but also without the jurisdiction of any admiralty court; and this proposition is fully met by the case of *Waring v. Clark*, 5 Howard, 441. This case disposes of the *infra corpus comitatus* restriction upon the jurisdiction of the admiralty courts; and the "ebb and flow of the tide" restriction was also swept away in the case of the *Genesee Chief*, 12 Howard, 449; *Benedict's Admiralty*, § 812

WILKINS, J.—The question presented in this case, is one of jurisdiction, and arises on a motion made to set aside a default regularly obtained three months before, and for leave now to file an answer.

The libel was brought to recover damages, which resulted from a collision between the *Young America*, and the schooner *Constitution*, of which the libelant was the proprietor. It states, "that the schooner started from the port of Erie, in the state of Pennsylvania, on the 20th of August last, with a cargo of coal bound for Toronto on Lake Ontario; and that while she was ly-

ing windbound on the heel path side of the Welland canal, and against its bank, she was carelessly run into by the propeller," and greatly damaged.

The proposed answer shows, that the "alleged collision occurred within the Welland canal," an artificial water communication, connecting Lakes Erie and Ontario, "and that the said canal is situated wholly within one of the counties of the province of Canada West," a jurisdiction foreign to that of the United States.

This court derives its jurisdiction from the constitution of the United States, and the acts of Congress made in pursuance thereof. The second section of article 3 of the constitution of the United States, in defining the judicial power of the courts of the United States, declares that it "shall extend to all cases of admiralty and maritime jurisdiction:" which manifestly embraces those subjects, whether of contract or tort, which were then, under the general maritime law, the appropriate subjects of the jurisdiction of courts of admiralty. There were cases upon, and contracts pertaining to the navigation of the high seas, in contradistinction to contracts made, or to be executed on land, or to torts of the same character as to locality, comprehending navigable rivers in which the tide ebbed and flowed.

The act of Congress of the 26th of February, 1845, did not (as has been held by the Supreme Court in the case of the propeller *Genesee Chief*) enlarge the jurisdiction of the national courts as to questions of admiralty, but merely conferred a new jurisdiction on the District Court. It declares that these courts shall "have the same jurisdiction in matters of contract and tort, arising in or upon vessels of certain character, which at the time were employed in business of commerce and navigation between ports and places in different states and territories, as was then exercised by the district courts as to vessels employed in navigation and commerce on the high seas."

It is contended by the respondent, that the tort complained of was not committed on any waters naturally connecting Lakes Erie and Ontario, but on an artificial communication, and without the jurisdiction of the United States. The force of this objection rests upon the construction of the declaratory words of

the statute. Jurisdiction is given over contracts and torts pertaining to vessels navigating between "different ports in different states and territories, upon the lakes and the navigable waters connecting said lakes."

A natural stream properly signifies a river flowing from its source to the ocean, or an outlet between one interior sea or lake and another, such as the rivers Mississippi, St. Clair and the Detroit. The statutory language is more comprehensive, and when we take into consideration the date of the statute, and the history of the Welland canal, with which great internal improvement and commercial facility we must suppose the legislature to have been acquainted, the phrase "navigable waters" connecting said lakes, cannot otherwise be construed than as embracing the Welland canal, the only "navigable waters" connecting Lakes Erie and Ontario, known at the time the act was passed.

It is conceded in the argument, that at the time the collision occurred, the schooner was engaged in navigating between a port on Lake Erie, and another port on Lake Ontario. These ports were in different states and territories. It is also conceded, that the Welland canal was the only water communication between the lakes. If this canal, then, is held not to be "navigable waters," within the meaning of the act, it would operate to exclude a large portion of the commerce of the lower lakes. Shall there then be no remedy for breach of contracts and torts, arising in the navigation and commerce between these lakes? For many years before the law of 1845 was enacted, a great and growing commerce was carried on between the different states bordering on both of them. In legislating, then, upon the subject, with the view of conferring jurisdiction, was it the intention to exclude this commerce, from the protection afforded by the law, to the commerce of the upper lakes, connected by rivers or natural waters. If such was the intention, wherefore the language employed, navigable waters, and not navigable rivers? But the act does not make the jurisdiction of the court to depend upon the locality or place where the tort was committed. That rests upon the character and the employment of the vessel. And if this vessel was of that character,

and was engaged at the time of the collision, in this description of commerce, we think the jurisdiction attaches.

The court, therefore, refuses to open the default, and denies the leave to answer.

DWIGHT SCOTT, Owner of the SCHOONER CONSTITUTION,
Libellant v. THE PROPELLER YOUNG AMERICA.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS JUDGE.

1. A rule of practice established by virtue of an act of Congress, has the force of a statute.
2. Upon a motion to vacate an order *pro confesso*, and for leave to answer, the respondent must satisfactorily account for his laches, and exhibit by answer or affidavit, a meritorious defence.
3. Where the respondent is a foreign transportation company, and the respondent's agent and proctor residing in the district where the libel is filed, were not apprised of the facts upon which to base an answer until some months after the libel was filed, a motion to dismiss the libel for want of jurisdiction, having in the meantime been pending, *held*, a satisfactory excuse for the respondent's laches.
4. An affidavit read with a view of showing a meritorious defence, upon a motion to set aside default and for leave to answer, in a case of collision, which does not deny the collision, and states the opinion of the affiant, that the collision was not occasioned by the negligent conduct of the master and officers of the vessel libeled, but was the result of unavoidable accident, without setting out the facts upon which the opinion is based, *held* insufficient.

THIS was a case of collision. A motion was made in the case to vacate an order taking the libel as confessed, and for leave to answer, based upon the sole ground that the alleged collision, as appeared from the libel, occurred upon waters beyond the jurisdiction of the court. The facts relied upon in support of this motion, and the opinion of the court thereupon, are reported, *ante*, p. 103. The court having decided to retain jurisdiction, the motion was renewed upon affidavits, which, it was contended, presented satisfactory excuses for the laches of the propeller's claimants,

and made out a case of meritorious defence. The affidavits read were those of Jacob Howard, one of the claimant's proctors, and Lewis W. Bancroft, master of the propeller. Mr. Howard's affidavit, after setting out the facts which had delayed the preparation of an answer, states that "from the statements he (the affiant) has received from Bancroft (the master), he believes the libelant has no just and valid claim for damages in this case; or if he has, the amount thereof will be materially reduced by the evidence which the owners of the Young America will be able to produce on the trial." Captain Bancroft, in his affidavit, alleges "that at the time of the collision, he was on board the propeller; that he was standing on the top of the pilot-house of the propeller, from which he could see, and did see all that took place respecting said collision: that the same was not occasioned by the careless, negligent, unskillful or improper management of said propeller, of this affiant, or of the crew thereof; but that the same occurred by unavoidable accident: that immediately after the same occurred, he went on board the Constitution (the vessel collided with), and examined the injury done to her by said collision, and is confident that the amount of damage to her occasioned thereby, could not, and did not, exceed fifty dollars: that the Constitution was by no means cut down to the water's edge, as stated in the libel, but that all the damage done to her consisted in the breaking off of only about three feet of her taffrail, and bruising her counter, which was occasioned by the stem of the propeller coming in contact with the stern of the Constitution, and that the schooner was hit by no other part of the propeller, except by her stem."

Howard & Mandell, in support of the motion, relied upon and cited the 29th rule of the Rules of Practice in Admiralty Cases, prescribed by the Supreme Court of the United States, which is as follows: "If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge

therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, and upon his payment of all the costs of the suit, up to the time of granting leave therefor." It was contended that the affidavits of Mr. Howard and Capt. Bancroft presented a case properly calling for the exercise of the discretion given to the court by the latter part of this rule.

Lockwood & Clark, contra.

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WILKINS, J.—The application is made to the court to set aside and vacate the order of *pro confesso* obtained in this case, under the 29th rule of practice, on the instance side of the District Court. This rule has the force of a statute, having been established for the government of the court by the act of Congress of August, 1842.

There having been no final hearing and decree, it is within the discretion of the court to set aside the default, treating it as a mere order, which may be vacated on a sufficient showing by the defendant, and "upon the payment of *all* costs of the suit, up to the time of opening the default." The language of the rule is unequivocal and absolute, and must control the action of the court. *All* costs must be paid, if the discretion of the court is exercised in granting the request of the respondent.

The sufficiency of the showing embraces two considerations essential to the vacation of the order and granting leave to answer. 1st. The respondent must satisfactorily account for his laches: and 2d, exhibit, either by answer or affidavit, a meritorious defence.

The libel was filed on the 29th of September, 1855. The vessel was attached on the 11th of October following, and default entered in November. A motion was made to set aside the default on the 12th of November, on the exhibition of an answer, professing ignorance in regard to the facts of the collision, and specially setting forth a plea to the jurisdiction of the court.

110 DISTRICT COURT OF THE UNITED STATES.

The Constitution and The Young America.

It is proper to state, in this relation, that at a session of the court, on the first week of November, the respondent, on making his motion to vacate the order *pro confesso*, informed the court that the design was simply to raise the question of jurisdiction, and by the direction of the court, presented the answer as a basis for his motion, which the court ordered on file.

The court will not, therefore, under these circumstances, consider the present motion as coming within the ruling by Lord KENYON, in *Greetheard v. Bromley*, 7 Term Rep. 455.

The original motion stood unargued until the 4th of February, 1856, neither party pressing its decision; and on the first day of the March term, was denied by the court.

Mr. Howard, in his affidavit, states "that he was employed as counsel in October, but was not placed in possession of the facts of the collision, so as to prepare the answer, until the first week in March; and then, for the first time, they were communicated to him by Captain Bancroft, who commanded the propeller at the time of the collision." These circumstances, with the further fact that the respondent was a foreign transportation company, whose agent here was not apprised of the facts attending the alleged collision until March, satisfactorily accounts for the laches. In an instance court, the time in which the first motion was held, under the mutual amicable understanding of counsel, seems too protracted, but the delay is sufficiently explained. But the affidavit of Bancroft, on which the court must rely, does not disclose a meritorious defence.

The libel charges a collision, and damages consequent.

The collision is not denied, but fully conceded by the affiant, who states that "the stem of the propeller collided with the stern of the schooner, breaking her taffrail and bruising her counter."

The opinion of the affiant, that this collision was not occasioned by the negligent conduct of the captain and his crew, and was an unavoidable accident, is not the assertion of a fact on which an indictment for perjury could be predicated. The affidavit is more specific as to the damages sustained—averring that they did not exceed \$50—but, as to this question, it can be settled under the 44th rule of the court, with as much accuracy,

The Buckeye State.

and on proofs by both parties; and the ends of justice as certainly attained, as if the court should now open the default, and permit an answer according to the affidavit of Bancroft, to be filed. The report of the commissioner, when confirmed by the court, will constitute the decree.

Motion denied.

STILLMAN, ALLEN *et al.* v. THE STEAMBOAT BUCKEYE STATE.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. The maritime lien confers upon material men and seamen, the right to enforce the same by a proceeding *in rem*. But this right is not without salutary restrictions, arising from, and demanded by, the interests of navigation.
2. The limitations prescribed by the common law do not apply to claims in admiralty without express statutory provisions, yet public policy requires that these liens should not be permitted to lay dormant, to the injury of third parties.
3. No cognizance will be taken of tacit liens, where circumstances are presented, creating justly the presumption that the lien is waived, and that the creditor looks to other security than the vessel.
4. Lapse of time alone is not enough to make a demand stale.
5. The policy of the law is, that a maritime lien should not be protracted beyond a reasonable opportunity for its enforcement.
6. Upon the northwestern lakes, where several voyages are made during the season from one extreme point of the lake to the other, there is great reason to limit these tacit liens to the season of navigation, and not extend them beyond one year, unless there are special circumstances contradicting the prescription which delay creates, especially when the rights of purchasers intervene.
7. Where libelants suffer a claim to sleep three years, with repeated opportunities to enforce it, and no excusatory circumstances exhibited, the presumption is strong and conclusive that the lien is waived.

THE libelants were proprietors of the Novelty Iron Works, in New York city, and by their agent furnished in 1851, to the steamer Buckeye State at Cleveland, Ohio, where the owners and

The Buckeye State.

builders of the boat resided, a portion of the fixtures to the engine. John B. Philips was the owner. She ran through three seasons of navigation from Cleveland and Detroit to Buffalo, a port of the state where the libelants resided. Philips then sold her to S. Gardner, her present claimant, and in his hands she was libeled. The other facts in the case appear in the opinion of the judge.

H. H. Wells, for libelants, cited as to admiralty jurisdiction, Act of Congress, February 26th, 1845; Act of September 24th, 1789; *The Genesee Chief*, 12 How. 443. That contract was made in New York city, and not in Cleveland. See 1 Parsons on Cont. 446; 2 Bibb, 280; 4 Wend. 377; 8 Gill, 430; 8 Martin, 93; 1 Louis. 248, 255. That this is not a "stale demand," see 3 Mason, 91; Ben. Ad. §§ 574, 575; Conk. Ad. 365; 2 Sum. 206; 6 Robinson, 48; 8 Jurist, 276; 3 Sumner, 287—a libel sustained after twenty years had elapsed.

Towle, Hunt & Newberry, for respondents. That there is no lien for supplies furnished in home ports, see 4 Wheat. 438; Davies' R. 71; 1 Sumner, 74, 79; 1 Gilpin, 536; 1 Story, 68; 14 Conn. 404; 1 Story, 246. That the law of Ohio gives no lien, see *The Plymouth*, reported in this volume, p. 56; 1 Mich. R. 172, 173, 475; 2 do. 351; also 11 Ohio, 462; 14 Ohio, 408, 411; 16 Ohio, 178. That this is a "stale demand," see Crabbe R. 43; 1 Sumner, 85; 1 Paine, 182; 5 Robinson, 102; 2 Story, 468. As to analogies of mechanics' lien by statute, see Michigan, (mechanics' lien), six months; Pennsylvania (13 S. & R. 269), six months; Maryland (3 Md. R. 168), six months; Missouri (15 Missouri, 281), six months; California (1 Cal. 183), six months; Mississippi (2 How. 874), three months; Massachusetts (4 Cush. 532), six months; Indiana (5 Black. 329; 8 do. 252), sixty days.

WILKINS, J.—The steamer Buckeye State was built at Cleveland, Ohio, in the summer of 1850. While in process of construction, and in an unfinished condition, she was sold in the fall of that year, to one John B. Philips, who had her towed to Buffalo, for the reception of her engine and machinery, which in part was purchased from the complainants, the proprietors of the

The Buckeye State.

Novelty Iron Works, the debt for the same being contracted by her then owner, Captain Philips, in the spring of 1851.

The respondent Solomon Gardner, purchased the vessel from Philips, in November, 1854, more than three years after the materials had been furnished, and when she had passed through more than three seasons of navigation in the commerce of the northwestern lakes, and without notice of the existence of the lien to enforce which, these proceedings *in rem* have been instituted. These circumstances are set forth in the answer, and are relied upon by the respondent as exonerating his vessel from liability on the account as "a stale demand."

The maritime lien, which attaches as soon as the debt is contracted, and though unregistered, has the effect of a registered mortgage, confers upon seamen and material men the right of enforcing the payment of the debt by a proceeding *in rem*, and the sale of the vessel. But such a right, which co-exists with the right to sue *in personam*, is not without salutary restrictions, arising from and demanded by the interests of navigation. Although the limitations prescribed by the common law are not applicable to claims in admiralty without express statutory provision, yet public policy requires that these liens should not be permitted to lie dormant, to the injury of third parties purchasing without notice of their existence.

The policy of limitations by which the statute law defines the period in which actions are to be brought for the recovery of debt, is based upon the reasonable presumption raised from the circumstance of the lapse of time, that the debt has been paid—a presumption which may always be rebutted by legal proof to the contrary. No such restriction, however, exists in admiralty. Yet the rule has been repeatedly settled, that no cognizance will be taken in favor of these tacit liens, when circumstances are exhibited creating justly the presumption that the lien is waived, and that the creditor looks to other security than the vessel. It is not the lapse of time, merely, which constitutes the demand stale; neither can any rule be safely prescribed as absolute in all cases, as to the period necessary. There may be claims, in regard to which equity would enlarge beyond the time fixed at law as a bar, and certainly, on the other hand, there may inter-

vene circumstances, as strongly raising the presumption, that the lien has been abandoned under a much shorter period than that which the statute indicates in analogous demands.

Seamen's wages, the most favored in admiralty courts, must be prosecuted without delay, and within a reasonable time after the termination of the voyage, or season of navigation, or the advantage of the lien, as security, will be considered as relinquished. And no good reason can be assigned why the lien of the material man, who furnishes his labor, and permits the vessel to depart from port, should be favored by the continuance of his lien, more than the seamen, who accompany the ship and aid in its navigation. Certainly, where the vessel is permitted to continue her voyages throughout the season, repeatedly leaving the home port undisturbed, the presumption is reasonable, that other security had been substituted, or that the creditor relied upon the personal responsibility of the owner. The policy of the law is, that a maritime lien should not be protracted beyond a reasonable opportunity for its enforcement.

This species of property is not permanent, is continually periled by the exigencies of navigation, and liable to frequent mutations of title, and therefore the courts will make every intendment against a protracted lien. Especially in the navigation of these northwestern lakes, where several voyages are made during the season, from port to port, traversing every two weeks from one extreme point to the other, there is great reason to limit these tacit liens to the season of navigation, and not extend their obligation beyond a year. In the case of *Blaine v. The Ship Carter*, 4 Cranch, 332, this principle seems to have been recognized by the Supreme Court of the United States. The circumstance that the case was one arising on a bottomry bond, does not render the doctrine inapplicable. The voyage of the *Carter* having been performed, there had been an opportunity on the part of the obligee to enforce his bond. Failing to do so, and the ship making two other voyages, and being sold, the Supreme Court held, "that the lien continued and had priority during the first voyage, but could extend no further."

In what consists the difference between this case and the one at bar? The first is an *express* lien; *this* a tacit lien. Why

The Indiana and Buffalo.

continue the one beyond what is reasonable in the other? If in the commerce of the ocean, the lien cannot with propriety be extended, except under special circumstances, contradicting the presumption which delay creates, beyond the voyage and a return to the home port, where it may be enforced, with equal propriety, should a season of navigation on the lakes, embracing the whole year, be conclusive, especially where the right of a purchaser without notice, has intervened.

In this case, the libelants have suffered their demand to sleep for three seasons of navigation, with repeated opportunities to enforce it on the vessel, and at different ports, without action on their part, and no excusatory circumstances exhibited. The presumption, therefore, is strong and conclusive, that they had waived the lien, and looked alone to the owner for payment.

On this point, then, without the consideration of the others, I order the libel to be dismissed, with costs.

NOTE.—This cause was taken by appeal to the Circuit Court, and will probably be decided in June, 1857, and be reported in Vol. VII, of McLean's Reports.—EDITOR.

JOHNSON L. HALL, Owner of the INDIANA v. THE PROPELLER
BUFFALO.

*District Court of the United States. District of Michigan. In
Admiralty.*

HON. ROSS WILKINS, JUDGE.

1. The rule is well settled, that a sailing vessel must keep her course in approaching a steam vessel, and the latter must keep out of the way of the former.
2. In collision cases, the master of the vessel whose situation is described, while standing upon the deck of his own vessel, has a more eligible situation for reliable observation, than a witness upon the approaching vessel.
3. The act of 1849 provides that, sailing vessels "going off large" or "before the wind," must show a white light. Under this act, a vessel "under way," with the wind "abaft the beam," must show a white light.
4. A vessel in nautical technicality is "going off large," when the wind blows from

116 DISTRICT COURT OF THE UNITED STATES.

The Indiana and Buffalo.

some point "abaft the beam," is going "before the wind," when the wind is "free," comes over the stern, and the yards of the ship are braced square across.

5. Where a steam propeller was descending the river St. Clair, in a night so dark that objects could be seen but a short distance, at a speed of eight miles an hour, and had discovered below her the lights of a number of vessels; *Held*, that she was in fault for not slackening her speed until she had passed.
6. When two witnesses were examined by deposition, were subsequently examined in court, and contradicted each other, reliance is to be given to the one who is sustained by his previous testimony, rather than the other. And although the depositions were not offered by the parties, yet the court when apprised of their being on file, may call for their production.
7. In collision cases, witnesses observing passing events from different positions, cannot be expected to agree, as to locality of objects, or the relative change of position; much more must this be the case where the one making the observations is under rapid motion.

Moore & Blackmar, for libelants.

Walker & Russell, for respondents.

WILKINS, J.—The libel charges a collision, between the bark Indiana and the propeller in the St. Clair river on the night of the 16th of August last.

It alleges, "that the bark was sailing slowly up the river, with a fair wind after: that she kept to the right, had proper lights, was fully equipped and manned, and while thus continuing her course, using all due skill and caution, she was negligently run into and greatly damaged by the propeller: that the said propeller was descending the river and keeping to the right: that within a short distance of the bark she recklessly changed her course, and in attempting to cross the channel she collided with the bark, and caused the damage: and that, had she not changed her course, the collision would not have taken place."

The respondent has filed two answers, one on September 10th, 1855, and the other as an amendment, on the 24th of October, following. In the first, the respondent states: "That during midnight (at the time specified), the propeller was sailing slowly down the river, at the speed of eight miles an hour, with all her lights displayed: that the night was dark and without moon: and that she kept the American side of the channel: that about two miles above the place of collision, numerous vessels were

The Indiana and Buffalo.

observed lying in shore with proper lights, at anchor: that the propeller blew her whistle for more than a mile before the collision: and that a look-out was kept by the captain and the mate on the pilot-house: that the white light of the bark Indiana was observed on the starboard bow, apparently at anchor, a short distance above the place of collision near the American shore: that about fifteen minutes afterwards, as the propeller neared the bark and could see her canvas, it was discovered that the bark was heading diagonally across the river, and but five or six rods distant: that the respondent then hailed the bark, and inquired, whether she was under way or at anchor, and on receiving the reply, 'that she was under way,' he immediately rang his bell to stop the engine, but that it was then too late to avoid a collision: that the big anchor of the bark hanging at her side, as she came round with great violence, raked the side of the propeller, and did her considerable damage: that the propeller was proceeding at a cautious rate of speed: that she stopped her engine as soon as she discovered the bark in motion: and that the collision was caused from no omission on the part of the propeller, but because the bark did not continue headed up the stream, as manifested by her light; and because she ought not to have weighed anchor when a large steam craft was descending the river, and suddenly swinging out into the stream and across the propeller's track."

This narrative of the transaction, and careful consideration of the incidents which caused the misfortune, was given by the captain of the propeller on the 8th of September, about three weeks after the event.

The amended answer does not vary this account in any important particular, and re-asserts the grossest want of ordinary care on the part of the bark, in displaying her white light, when she had a free wind and should have headed up, and not across the stream, when she must have known by the whistle, that a large steamer was descending.

The general rule is well settled in admiralty, that a sailing vessel must keep her course when approaching a steamer, and that the latter must keep out of the way of the former. There is but one exception, which, however, does not apply to the facts

in this case as set forth by the respondent. Where the steamer, could by no exercise of diligence and watchfulness, discover the sailing vessel at a sufficient distance to avoid her, by changing her course, she is not responsible. In this case, as the answer discloses, though the night was dark, yet the light of the bark, with other similar lights, was discovered more than a mile distant, and for more than a quarter of an hour before the vessels collided. In the case of *Peck v. Sanderson* (17 Howard), the steamer had no time to change her course when the Mission was discovered.

There are three allegations contained in this libel, which if sustained by the proofs, exonerate the bark from all blame, and fix the responsibility upon the steamer. They are:

1st. That the bark was heading up the river with a free wind, and consequently had her proper light, indicating that she was "at large" or "before the wind."

2d. That she was properly manned; and

3d. That the propeller recklessly changed her course.

As to the first and last allegations, there can be no doubt, if credit be given to the testimony of Captain Faulkner and his crew, who all testify "that the bark had taken her course up the river, and kept in that course, with a fair wind abaft the beam, with a proper white light on her pawl bit, and did not change until the collision occurred." Captain Faulkner says that when he first heard the whistle, and saw the lights of the propeller, he was under way, heading up the river. "The propeller was rapidly descending toward us, and on our larboard side, and about a mile distant." That, as she approached nearer, he gave the order to port, and the bark was kept in her course. When the propeller approached within a few rods, her captain cried out: "Are you under way, or at anchor?" and on being informed that the bark was under way, the order was given, on board the steamer, "hard a-starboard;" in obedience to which the steamer swung across the bow of the bark and struck her about midships.

This important testimony is measurably contradicted by Captain Conkey and those of the crew of the propeller who witnessed the transaction, which discrepancy imposes upon the court the reluctant duty of discrediting one or the other.

Where one witness is contradicted by another, reliance is to be given to the statement of the one above that of the other, if both having been previously examined in regard to the same matter, the one is sustained by his previous testimony, while the impeaching witness is himself thereby impeached in material points.

Captain Faulkner's deposition before the commissioner corresponds with his testimony in court. Captain Conkey's is otherwise. And although these depositions were not offered during the trial, yet, on being apprised that such were on file, they were called for by the court, which avenue to the discovery of the truth is not to be closed by either a technical adherence to rule, or the omission of parties to introduce them in evidence.

The testimony of Conkey is not only variant from that to which he testified on the trial, but his deposition is most glaringly inconsistent with his amended answer, and incongruous throughout. Thus he swears, that when he first saw the bark, she "was from five to ten rods off." And then subsequently states that "the bark was then heading right up stream," and that he "didn't see her change her course after that:" and that when he "first saw her sails she was lying diagonally across the river on our starboard bow:" and lastly, "when the bell was rung, the vessels were from three to five rods apart; and the collision took place ten minutes after the bell was rung, and two minutes after my last order 'to hard a-port:' and as soon as I saw her sails, I hailed her, to learn whether she was under way or not."

By the testimony of the mate, the propeller's speed was between eight and ten miles: the answer alleges the same fact; which is, evidently, grossly inconsistent with the statement that the collision took place ten minutes after the signal bell was rung; and so is the statement as to his distance when he first saw the bark, and that she afterwards did not change her course, with his other statement that "she was lying diagonally across the river." It is obvious that if the steamer's speed was at the rate of a mile in seven minutes, and the signal bell was rung when they were but five rods off, the collision must have occurred in as many seconds as he has mentioned minutes. But,

120 DISTRICT COURT OF THE UNITED STATES.

The Indiana and Buffalo.

moreover, the statement of Faulkner is corroborated by his crew ; while the adverse narrative of Conkey is not so sustained.

Conkey swears that the bark lay diagonally across the stream. This could not have been her position if his other statement be true, that when he first saw her she was heading up the stream, and did not afterwards change her course. Now, Captain Faulkner testifies, that as the propeller approached, he saw all her lights ; and this, from the time he first saw her, until the collision.

In cases of this description, there will be much discrepancy in the testimony. Witnesses observing passing events from different positions, cannot be expected to agree either as to locality of objects, or relative changes of parties and things. Much more must this be the case when a rapid movement is made and making by the observing party toward the object whose true and relative position he undertakes to describe. Without the ascription of moral dereliction, a witness, under such circumstances may, with propriety, be rejected, in favor of a contrary statement, by one occupying a more eligible position for truthful observation.

Captain Faulkner was better situated to state the true position of the vessel whose decks he trod, than Captain Conkey, on the propeller, approaching at the rate of eight or ten miles an hour. And Captain Faulkner's statement is self-consistent, and in accordance with the evidence of the expert testimony as to the inevitable conclusion to be drawn from the character of the collision itself.

It is alleged in the answer, that from the force of the collision, the bark being turned, her big anchor (hanging at her starboard bows) raked the entire side of the propeller. Such is the fact unquestioned. Now Conkey and his men swear that the two vessels struck each other at an angle, a little less than a right angle, and that, the speed of the propeller "slewed" the head of the bark down the stream, and consequently, if so, this anchor could not have performed this extraordinary feat, being on the side of the bark most distant from the propeller. This was evident, as well from the exhibition of the models, as from the positive testimony of Captain Ward, who testified that, if such

The Indiana and Buffalo.

was the position of the two vessels when they came into collision, this anchor could not have been carried away, or even touched the propeller.

Without further analysis, the court has no hesitation in declaring its judgment to be, that, as to this prominent and important fact, the preponderance of the testimony is with the allegation of the libellant, and that the bark was heading up stream, and not diagonally across. If so, she exhibited her proper light and was not at fault. By the act of Congress of 1849, steamers and sail vessels navigating the western lakes and rivers, are directed at night to exhibit certain lights, to indicate their course when under way, and when at anchor. Vessels going off large, or before the wind, or at anchor, must show a white light.

There is, in nautical technicality, a difference between "going off large" and going "before the wind."

"Going off large," is when the wind blows from some point abaft the beam, or over the quarter of the ship. Going "before the wind" is when the wind is free, comes over the stern, and the ship's yards are braced square across. Sailors and mariners may recognize the distinction, but the statute makes none, as the signal of the "white light" is applied to both exigencies.

In this case, the bark was clearly not on her starboard tack, because the entire testimony is, that the wind was fair, up the river, and in the language of some of the witnesses, "abaft the beam." Her bow might have had a slight tendency to the shore, from the force of the current, but nevertheless, heading up stream, and therefore she displayed the right light.

That the propeller recklessly changed her course, when at a dangerous proximity to the bark, appears manifest from the testimony of Captain Conkey, more minutely given in his deposition, than in court.

After the propeller had approached so near as to hail the bark, and the response was given "that the bark was under way," the captain ordered his vessel "hard a-starboard" and immediately afterwards, as if in confusion, when the vessels came nearer, "hard a-port." Had he kept his course, the collision would not have occurred.

Independent of these circumstances, which are conclusive as

to where the fault is attributable, the propeller was at too great a speed in descending the river at night, when it was so dark that he could not discern objects on the deck of a vessel but a few rods off, and when, fifteen minutes before he observed a number of vessels lying at anchor. He should have slackened his speed when he first discovered the lights at the distance of a mile off. As was stated in the case of the *Rose*, adopted by the Supreme Court, in the case of *Newton v. Stebbins*: "It may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity, if the property and lives of other persons are thereby endangered."

The propeller should have cautiously felt her way, until she passed all the lights which she had discerned in the distance. By so doing, she would have ascertained the true position of the bark and have avoided the collision. The light being considered as according to the statute, and no contest as to the competency of the officers and crew of the bark, there is no fault adjudged on the part of the libellant.

As to the jurisdiction of the matter, the tonnage and ownership of the vessels being admitted, no proof is deemed necessary. The libellant was in possession, and exercised ownership. The testimony of Faulkner and Osborne is sufficient as to this objection.

The libellant being entitled, from this view of the case, to recover, yet no other damages than those actually sustained, can be allowed. Speculative damages, embracing probable profits, cannot be decreed. Upon this point, there have been variant decisions among the American courts, but as at present advised, this court will refrain to sanction such a rule, based as it is, upon what might have been, *i. e.* upon an uncertainty.

Decree for \$195.06

The L. B. Goldsmith.

In the Matter of the Proceeds of the L. B. GOLDSMITH, and the petition of N. & N. W. EDSON, for a share, and the answer and petition of B. F. BRUCE & COMPANY, for the said proceeds.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. Under the 43d rule of admiralty practice, the party entitled to remnants or the surplus in court, can only obtain it by petition or motion, and any one having an interest has a right to intervene "*pro interesse suo*," whether his application involves the settlement of partnership accounts or not.
2. When several part owners, having unsettled accounts between them, petition for a statement of account and payment of their shares, and the managing owner of the boat asks that the whole should be paid over to him; it would be unjust to pay the surplus to the managing owner, and turn the other petitioners over to a bill in chancery, for the recovery of their interest; and it would operate oppressively to retain the amount in the registry of the court until the matter was settled in equity.
3. When the admiralty has taken jurisdiction of the subject matter, it will continue the exercise of the same until the remnants are appropriated.
4. Answers to special interrogatories are considered as analogous to the decisory oath of the civil law, and no more evidence for one party than the other, and will not be conclusive for either, where the weight of the other proof in the case preponderates against the fact sworn to, or when, by self contradiction, suspicion attaches to the fidelity of the answers.

Howard, Bishop & Holbrook, for N. and N. W. Edson.

Towle, Hunt & Newberry, for B. F. Bruce & Co.

The schooner L. B. Goldsmith was built in Toledo in 1855. In the winter of 1856, she was libeled at Detroit, and decrees pronounced against her to the amount of \$750. The vessel was sold by the marshal for \$3,000, and after payment of the decrees, there was a surplus of about \$2,250, in the registry.

N. & N. W. Edson file their petition, and claim the greater part, and B. F. Bruce & Co. file an answer, and a petition that the amount be paid to them as managing owners. They also

file an exception, claiming that the court has no jurisdiction to settle the accounts between the parties.

N. & N. W. Edson, then, by leave of the court, propound to B. F. Bruce a number of special interrogatories, as to the matters in difference between them. B. F. Bruce & Co. file their answers thereto, and the matter is referred to a commissioner to take proofs. The commissioner reports the testimony back to the court, and the case is called for hearing.

Mr. Bishop. The answers to interrogatories are not full evidence for the party who makes them. Their effect is simply to turn the scale, when the case stands in *equilibrio*, or in great doubt. 3 Greenleaf Ev. § 392; 2 Conk. Ad. 626, 627, 628, 629, and note; 1 Story R. 91, 102, 103; 1 Pothier on Obligations, 826.

Mr. Towle. This case involves a settlement of partnership accounts, a matter not within the jurisdiction of this court. *Steamboat Orleans v. Phœbus*, 11 Peters, 175, 182; *The Apollo*, 1 Hagg. 306; *Atkyns v. Burrows*, 1 Pet. Ad. 244; *The John*, 3 Robinson's Ad. R. 288, cited in full in Conk. Ad. 41-5; *Harper v. A New Brig*, Gilpin's R. 536; Benedict Ad. § 562.(1)

WILKINS, J.—Nathan Edson and Nathan W. Edson, of Toledo, Ohio, on the 31st of March last, presented and filed in this court their petition, under the 43d rule of the practice in admiralty prescribed by the Supreme Court of the United States, for part, or whole of the remnants or surplus in court, of the proceeds of the sale of the L. B. Goldsmith. Having given the notice required, their prayer is resisted by B. F. Bruce & Co., alleging their interest in these proceeds, as part owners before sale and condemnation.

From the proofs, it appears that this scow was built at Toledo, in the year 1855. On her second voyage, in the fall of that year, she was laid up for the winter at Detroit; libeled by Mar-

(1) The argument of counsel in this case was full, but mostly pertained to the questions of fact.—Ed.

The L. B. Goldsmith.

cus Emerson and others, and sold, in the spring of 1856, by the decree of this court, for \$8,000. The decrees in all amount to about \$750, leaving a surplus in the custody of the clerk, of \$2,250.

The Edsons set forth in their petition (which is not denied by the other claimants, B. F. Bruce & Co.), "that, in the summer of 1855, they, as ship builders, commenced building this scow, at the port of Toledo: that after they had expended \$1,600 in her construction, Bruce & Co. purchased from them one-half of their interest for the sum of \$800, under an agreement to furnish that amount in goods and boat stores for finishing said scow; and all subsequent necessary expenses in finishing and furnishing, were to be equally borne by both parties.

B. F. Bruce, of the firm of B. F. Bruce & Co., claims, as the managing owner of the scow, at the time she was libeled, the whole of the remnants, urging that this court cannot adjudicate upon the subject in controversy, because a settlement of partnership accounts is involved, over which a court of admiralty has no jurisdiction.

The position is erroneously assumed. The scow, the subject of the partnership, has been taken from their joint possession; and the controversy is, as to the distribution of the proceeds after sale, and the satisfaction of the decrees obtained against her, under the law prescribed for the government of the courts of the United States in such cases, by the 43d rule of admiralty practice. The party entitled to the remnant or surplus, can only obtain it by petition or motion. And any person having an interest, has a right to intervene "*pro interesse suo*," upon due notice to adverse parties, whether his application may, or may not involve the settlement of partnership accounts. The court would not, under the circumstances disclosed by the proofs, direct the entire fund to be paid to B. F. Bruce as managing agent of the boat. His agency ceased, when the boat was libeled and sold. The partnership terminated at the same time; and he appears now in court, not as agent of the Edsons, but in his individual character, as claiming only the interest of B. F. Bruce & Co. It would be unjust to the Edsons, to direct this surplus to be paid to Bruce, and turn them over to their

bill in chancery for the recovery of their interest. It would likewise operate oppressively, to retain the amount in the registry of the court, until the matter is adjudicated by the same judge, sitting on the equity side of the Circuit Court for this district.

The admiralty having taken jurisdiction of the subject matter, will, under the practice prescribed by the act of Congress, continue the exercise of the same, until the remnants are appropriated; and there is no mode known to the law, by which the amount can be taken from its custody, but in the way indicated by the 42d rule. Moreover, the matter is not so complicated as to disable the admiralty judge from passing upon the accounts of the parties. Sitting in admiralty, he may not enjoy as enlightened a conscience, as when sitting in the circuit, but he possesses the same power of facilitating his labors, by directing computation, and whether in the one or the other relation, the duty is incumbent of passing upon the various items of the accounts of the parties, and allowing or disallowing according to the rules of law, and the weight of the testimony. The sum in the registry is about \$2,200. The petitioners and the Bruces will be entitled to an appropriation according to their respective investments in the scow.

First, then, what was the interest of the Edsons? It is conceded that the boat was worth \$1,600, when half was purchased by the Bruces. Their payment was \$800 in goods to be worked in the boat. Consequently, at the time of the sale, the Edsons' interest was \$1,600, and the Bruces' \$800. After this, each party is to be credited for their legal advances and services; and to that we proceed.

But, at the threshold of this inquiry, we deem it necessary to observe that the answers of B. F. Bruce to the interrogations propounded by the petitioners, are not so free from all shade of suspicion as to render them conclusive as to the disputed facts. Although considered as analogous to the decisory oath of the civil law, yet their effect, at the utmost, is but to turn the scale when in *equilibrio*, or to settle a doubtful point in the proofs. The answers are, it is true, sworn responses to special interrogatories propounded by the petitioners in an appeal to the conscience of the respondent, and, as held by Judge WARE, in *Stut-*

The L. B. Goldsmith.

son v. Jordan, 18 Am. Juris. 294, are propounded with the intention of making the decision depend on the answers, and, therefore, to give to them the force of evidence. But they are no more evidence for one party, than for the other, and will not be conclusive for either, where the weight of the other proofs in the case preponderates against the fact sworn to, or where, by self contradiction, suspicion attaches to the fidelity of the answers.

Antecedent, then, to any advances by either party, at the time of sale, the Edsons had two-thirds of the scow, and the Bruces the other. This entitles the Edsons to \$1,600 to begin with. To this is to be added their proven account, amounting to \$1,174; in the total \$2,774.90.

What then is the claim of Bruce & Co., as sustained by the proofs? In the first place, the court reject the whole of their private account against the Edsons, amounting to \$633. Because, by the agreement of the parties when the Edsons sold, only the necessary expenses in finishing and furnishing the boat, were chargeable against her, and the fund in court is the fund of the boat, to be distributed among its claimants; and this private account constituted no such lien; and furthermore, it is not a joint account against the Edsons, and most of the items are family supplies, and not a lien upon the scow.

For these reasons, deeming them sufficient, I reject the claim, withholding comment as to the character of the account of the Bruces as compared with the pass-book of the Edsons. Certainly, where a discrepancy exists, the judgment must be in favor of the pass-book, as constituting entries and charges in the handwriting of the Bruces, at the time the charges were made. The account, if just, can be sustained before another tribunal than this; and the Cleveland judgment of \$102.00, being of record, is susceptible of stronger proof than parol evidence.

Exhibit B, attached in the response to interrogatory 8, must be sustained with certain deductions, although supported alone by the answer to the interrogatory. These deductions are, 1st. The item for lumber (considered disproved), \$22.40. 2d. The item of materials to the amount of \$800.00. This sum was the consideration for the purchase of the one-half, and is already allowed to the Bruces.

128 DISTRICT COURT OF THE UNITED STATES.

The L. B. Goldsmith.

Exhibit C, in response to the tenth interrogatory, shows the amount of freight received for the two voyages at \$485.05, which sum is to be deducted from exhibit D, which shows the expenses incurred at \$606.63; and consequently a loss to the scow of the difference of \$120.68, one-half of which must be credited to the Bruces as being their proportion; and they having paid the whole, I do not consider the proof submitted by the petitioner as to what the freight ought to be, as sufficient to overturn the positive account and statement of what it actually was, made in response to the special interrogatory of the petitioner. Yet, from this exhibit D, should be deducted the bill of Wilcox & Fuller of \$17.24, which is unpaid, the towing and captain's wages being allowed. As to the necessity of towing, this court will not now inquire, and also will presume that the other items are unobjectionable, saving the charge made by B. F. Bruce, for his expenses to Detroit, of \$39.65, making the deductions from exhibit D \$56.89, and leaving as a correct charge, \$549.74. To which add as credit, half of the loss on freight, \$56.89. Total, \$606.63.

The additional libels filed in favor of Brayman and others, but not prosecuted, constitute no lien upon the remnant. If such liens ever existed, they should have been prosecuted, and they cannot be allowed as a credit to the Bruces, because no proof has been furnished of their payment by them. With these deductions, we state the account of the Bruces. Exhibit B, \$900.92; exhibit D, and C, \$606.63; total, \$1,507.55; making the division of the surplus to be in this proportion: the Edsons, \$2,774.90; the Bruces, \$1,507.55.

Let the clerk enter a decree accordingly.

his own superintendence at the rate of \$4 per day, for nine and a half days. The charge, therefore, for 215½ day's work, at twenty shillings, amounting to \$538.75, must be reduced by subtracting this extra charge of two shillings per day, which amounts to \$52.75, and makes the item properly chargeable, above what was paid to each man, cannot be considered in the light of compensation for the libellant's time, for he charges for

**FREDERICK MCKEE, Owner of SCHOONER PILOT v. THE STEAM-
BOAT PEARL.**

*District Court of the United States. District of Michigan. In
Admiralty.*

HON. ROSS WILKINS, JUDGE.

1. A vessel when beating down the river, need not "heave in stays" in meeting a steamboat, but must keep her course.
2. It is the duty of the steamboat to avoid the vessel.

THE Schooner Pilot was beating down Detroit river in broad daylight, when near the head of Bois Blanc Island, and close hauled on the starboard tack, she was struck on her starboard side by the steamboat Pearl ascending the river, both vessels being near the buoy on the Canada shore.

John S. Newberry, for libelant.

Lothrop & Duffield, for respondent.

WILKINS, J.—The steamboat was ascending and the schooner Pilot was beating down the river. The important fact is admitted by the answer, which, according to the principles settled in 10 Howard, 580, fixes the fault on the steamboat. The answer alleges "that the schooner did not go about or heave in stays, but kept on her course." Being propelled by sails, this was her duty and no fault; and as settled by this court in "*The Whip and Michigan*," the steamboat should have avoided her. The collision occurred in broad daylight, and could have been, and should have been, avoided by the steamboat.

By the proofs submitted, the schooner sustained considerable damage by detention, repairs and injury to cargo, amounting in all, by the estimate furnished, to \$265.81.

Decree for that amount.

NOTE.—This cause has been taken by appeal to the Circuit Court, and is not yet decided. The decision of the circuit will probably be found in 7 McLean.—Ed.

SOUTHERN DISTRICT OF OHIO.

DECISIONS

OF THE

HON. H. H. LEAVITT, JUDGE.

MICHAEL N. MCGINNIS v. THE STEAMBOAT PONTIAC.

District Court of the United States. District of Ohio. In Admiralty.

HON. H. H. LEAVITT, JUDGE.

1. When a steamboat is in actual peril, and one is requested to take charge of her, and save her, if possible, with no stipulation as to time or wages, the fact of acting as master, not having been so before, will not deprive him of the right to claim salvage.
2. The fact of peril is to be ascertained from the circumstances surrounding the boat, at the time when the salvage service commences, and the fact of escape is not to be taken as proof that there was no peril.
3. The fact that the exertions of the salvor alone did not save the boat, she being finally saved by the particular manner in which the ice broke up, does not deprive him of the reward due a salvor, if he encountered the danger and did all that could be done under the circumstances.
4. There is no fixed rule of compensation for salvage services. It must depend upon the particular circumstances. It may be a per centage upon, or a certain proportion of the thing saved, or a fixed sum to be assessed *pro rata* upon the boat and cargo. In this case the latter course is adopted.
5. The admiralty jurisdiction of the District Court of the United States, extends to all the large, public navigable rivers and lakes of the United States. The Ohio river is one of that class.

T. Walker, for libellant.

C. D. Coffin and *A. Taft*, for defendant.

The Steamboat Pontiac.

LEAVITT, J.—This is a libel *in personam* for salvage, promoted by Michael N. McGinnis, against the owners and freighters of the steamboat Pontiac No. 2.

The material facts stated in the libel, on which the claim for salvage is founded, are that on the 30th of January, 1852, the steamboat Pontiac, with a valuable cargo, bound for Cincinnati, in ascending the Ohio river some distance below Louisville, met with a gorge of ice, and was in a condition of extreme peril: that having been deserted by all her passengers, and many of her officers and crew, the libelant, then a passenger on the steamer Sparhawk, also attempting to ascend the river, and involved in the same gorge, was requested by A. Warden, the master, and William F. Belser, one of the owners of the Pontiac, to take charge of her, and try to save her, the said master and owner then being about to leave her; and that the libelant did accordingly take charge of her, and with the assistance of some of the officers and crew, saved her from her imminent peril, and brought the boat and cargo safely to Cincinnati. The libelant also avers, that upon the arrival of the boat at Cincinnati, he consented to the delivery of the freight to its several owners and consignees, but retained possession of the boat as salvor, till the 10th of February, 1852, when he was forcibly expelled from her by one of the owners, who refused to make him any compensation for his services, except his wages as master, for the time he was in command. The libelant claims reasonable salvage for the assistance rendered the boat.

The answer of the owner of the boat and the cargo, after setting out the circumstances connected with the stoppage of the boat in the gorge of ice, denies that she was in peril; and avers that the libelant was employed to take charge of the boat as master, in the place of Captain Warden, then disabled by sickness, and not as salvor. The answer also denies that the Pontiac was deserted or abandoned at the time the libelant took charge of her; and alleges that she was well provided with men, and the means necessary to preserve and protect her; and that she sustained no damage, and proceeded on her way to Cincinnati, in charge of the libelant as master, because of the continued ill health of Captain Warden, and his inability to resume the com-

The Steamboat Pontiac.

mand ; and that the services of the libelant do not entitle him to compensation as a salvor.

It is also set up in the answer, that the case made in the libel is not within the admiralty jurisdiction of this court.

The facts requiring notice preliminary to the consideration of the points arising in the case as established by the evidence, may be summarily stated as follows : In the afternoon of the 30th of January last, the steamboats Ohio, G. W. Sparhawk, Washington, Pontiac No. 2, Milton and Col. Dickenson, in the order here named, were attempting to ascend the Ohio river, through a narrow opening or channel made through the ice by two boats ahead of them, when the whole body of the gorged ice, on both sides of this channel, before stationary, began to move, and in its progress entirely shut up the passage through which the boats before named were ascending ; and they became so involved in the ice as to render it impossible to move by the aid of their machinery, either upward or downward. The mass of gorged ice, thus set in motion, moved a distance of two or three hundred yards, when it stopped. By this moving of the ice, the Ohio, being ahead of all the other boats, was forced down for some distance ; the Sparhawk, being the next to the Ohio, was driven down against the Washington ; and such was the force of the collision that the latter boat was sunk. The Milton was forced against the Col. Dickenson, materially injuring the latter ; and at the same time the Pontiac was swung around, and driven stern foremost into a crack or opening in the ice, towards the Indiana shore, where she lay when the ice stopped ; her bow quartering a little up the stream, and her stern within twenty or thirty yards of the shore. During this movement of the ice, and from the great danger in which all the boats were involved, there was much alarm and consternation among the passengers and crews, which was increased by the cry, that the wrecked boat, the Washington, was on fire. The passengers, and some of the officers and crews of all the boats, except the Ohio, from which escape was impossible, from the thinness of the ice surrounding her, left the boats in the ice, and sought safety on shore. The gorged ice extended for some distance above and below where the boats lay ; and, although the natural thickness of the ice, except near the shores, did not exceed

The Steamboat Pontiac.

six or eight inches, yet as the result of the stoppage of the mass of the descending ice, it was so filled up and crowded together, that in some parts of the gorge, it was, as estimated by the witnesses, ten feet, or even twenty feet thick. After the stoppage of the gorge, leaving the Pontiac in the position before described, by the direction of Captain Warden, she was, as far as practicable, made secure in her place by a line or hawser, passed several times from her stern to the shore; and by his order also, the ice immediately below the boat was cut away, that she might swing in towards the shore, when the gorged mass should again start.

The libelant, who had for some years been engaged in the steamboat service on the river, both as pilot and master, was a passenger on the Sparhawk. Some time in the afternoon, subsequently to the stoppage of the ice, as before noticed, by the request of Captain Warden, and the concurrence of William F. Belser, one of the owners of the Pontiac, and then a passenger on her, the libelant consented to take charge of her as master, without any agreement as to compensation, or the time he was to continue in command. Captain Warden and Mr. Belser then left the Pontiac, and did not come on board again that night. Between six and seven o'clock in the evening the libelant took the command of the boat, and was on duty till morning, giving, throughout, the necessary orders, and attending to the usual duties of a master. About eleven o'clock in the night, from the cracking of the ice above, it became certain it would again shortly be in motion, and between three and four in the morning, the gorged mass started, and passed down without any injury to the Pontiac. In the morning, after relieving her wheel from the ice which was gorged under and upon it, the boat proceeded on her course upward, in command of the libelant, and arrived at Cincinnati on the 5th of February.

This general view of the evidence will suffice, as opening the way for the consideration of the points arising in the case.

It is insisted, in the first place, by the counsel for the respondents, that the libelant, as master of the Pontiac, has no claim for salvage service; having performed no duty that he was not bound to perform in virtue of his official relation to the boat.

The Steamboat Pontiac.

There is no room to doubt the correctness of the position, as a principle of maritime law, that a master, for any ordinary service in saving the vessel or cargo, cannot assert a claim for salvage. It is well settled, that "in general, neither the master, nor a passenger, seaman or pilot, is entitled to compensation, in the way of salvage, for the ordinary assistance he may have afforded a vessel in distress, as it is no more than a duty; for a salvor is a person who, without any particular relation to a ship in distress, proffers useful service, and renders it without any pre-existing contract, making the service a duty. But a passenger or an officer, acting as such, for extraordinary exertions beyond the line of his duty, has been deemed entitled to a liberal compensation as salvage." 3 Kent's Com. 246; 1 Conkling Ad. 274.

In the case before the court, the evidence affords no ground for the conclusion that the services of the libelant were of such an extraordinary character as to entitle him to salvage, if he is to be viewed merely as the master of the boat, under the usual circumstances of employment as such. But it seems to the court a pertinent inquiry, whether under the peculiar circumstances in which the libelant took charge of the Pontiac, he is within the scope and reason of the rule excluding a master, for ordinary services, from setting up a claim for salvage. The rule is founded on considerations of public policy, and is designed for the protection of the great interests of navigation and commerce. The obvious propriety, not to say necessity, of providing against temptation to place property afloat on the ocean, lakes or rivers, in a situation of peril, for the fraudulent purpose of asserting a claim for salvage for its protection and safety, led to its adoption. It is a rule, therefore, founded in good sense; and, in all proper cases, should be rigidly enforced. But I do not perceive its applicability to the case of this libelant. He was a passenger on another boat, and could have had no agency in bringing the Pontiac into the position of danger in which it is averred she was placed. He was under no obligations to take command of her, or in any way to incur any hazard or render any aid for her protection or safety. He was requested to take charge of the boat, with an injunction to save her if pos-

The Steamboat Pontiac.

sible, and without any stipulation as to wages or compensation. Do not these circumstances take the case out of the operation of the rule referred to, excluding a master, in ordinary cases, from asserting a claim for salvage? And may not the libelant be fairly regarded as one who, within the definition before cited, has virtually proffered and rendered useful service to a boat in distress, without any pre-existing contract, making the service a duty? So far as motive is concerned, the facts do not allow the presumption that the libelant would voluntarily incur the responsibility and hazard resulting from his taking the command of the boat for the trifling pecuniary remuneration he would be entitled to as master, at the ordinary rate of wages, for the few days that he would be employed as such. It is, therefore, consistent with the facts, to suppose that he looked for some compensation for his services beyond the usual pay of a master.

In stating the result of my examination, that under the circumstances of this case, I do not regard the fact that the libelant was in the position of master at the time the service was rendered, as excluding him from a claim for salvage, it is proper I should say that I have reached this conclusion without the aid of any authorities bearing on the point. In looking into the few books on maritime law which are accessible to me, I have found no case reported, or principle settled, which directly touches the inquiry here involved.

The next point made by the counsel for the respondent is, that the steamboat Pontiac, at the time the libelant took charge of her as master, and while he was in command, was not in such a condition of imminent peril as to be a subject of salvage service.

It is a well settled principle of maritime law, that "to warrant a claim of salvage, the danger to the property saved must be real and imminent. Mere speculative danger is insufficient; but it need not be such that escape from it by other means was impossible." *Tulbott v. Seaman*, 1 Cranch R. 1; 1 Cond. R. 229.

In looking into the evidence, it is impossible to resist the conclusion that the Pontiac was in great danger, at the time, and after the libelant took charge of her. Her position, after the moving of the ice in the afternoon, has been before noticed. She

The Steamboat Pontiac.

lay with her stern towards shore, in a crack or opening in the ice; her bow out, with a slight angle up stream, her stern being made fast to a rock on shore, by lines. Several witnesses of long experience on the river, and familiar with all its perils, say they considered it certain the whole mass of ice in the river would be in motion during the night. They also state there was the strongest probability, amounting, in the opinion of some of them, to a certainty, that when the ice did start, all the boats in the gorge would be lost. Some of the witnesses state that the Pontiac, from her position and her heavy freight, was in the greatest danger. There was danger—some of the witnesses thought it inevitable—that the heavy shore ice would press down against the upper side of the boat and crush her; or otherwise the lines with which she was made fast would be broken, and she would be carried down and wrecked upon Rock Island, a short distance below. It appears, too, from the conduct of the passengers on all the boats, that they thought there was the most imminent danger the boats would be lost during the night. All left the boats and went ashore, although the night was very dark, with constant rain, preferring to encounter the discomforts of exposure to the inclemencies of the weather—some without any shelter, and some imperfectly protected by tents—to remaining on the boats. As many of the officers and crews of the boats as were not needed for their management, also went on shore. Mr. Belser, one of the owners of the Pontiac, left her as already stated, with a charge to the libelant, in taking command, to save her if possible. Captain Warden also, on account of his feeble health, went ashore; giving as the reason, that remaining on board, in case of accident to the boat, he might be obliged to take to the water, which would, as he thought, endanger his life, in his then condition of bodily ailment. Several witnesses—some of them officers of the Pontiac—state that no pecuniary consideration would have induced them to stay on board during the night.

The event so confidently anticipated in the evening, actually happened during the night. The whole mass of the gorged ice moved about three o'clock, threatening all the boats with destruction. But one, however, the Dickenson, was seriously in-

The Steamboat Pontiac.

jured. That the Pontiac was not lost, was owing to the fact that the gorge broke first towards the middle of the river, and did not carry with it all the heavy shore ice above her.

This summary of the facts in this case shows, I think, conclusively, that the danger to which the Pontiac was exposed during the night referred to, was not merely speculative, but real and imminent.

It is true, it is not proved that but for the service and assistance of the libelant the boat would not have been saved. Yet there can be no doubt that his taking the command of her under the circumstances, involved great personal peril to himself; and that without his services, the boat and cargo would have been in much greater danger of being lost. Captain Warden, very justifiably, under the pressure of sickness, left her, as did also Mr. Belser, one of the owners. The presence of a master, for the proper management and security of the boat and cargo during the night, was indispensable; and the libelant in consenting to take charge of her, in her condition of peril, and doing all that could be done for her safety, it seems to me, is not only entitled to the credit of courageous and meritorious conduct, but to a compensation, as for a salvage service.

In the United States Digest, Sup. Vol. II, 781, I find the doctrine asserted, that "in all cases where services are rendered in saving property in danger of being lost on the high seas, or when wrecked or stranded on the shore, it is, in the sense of the maritime law, a salvage service." The case referred to in the digest is that of the *Centurion*, Ware's R. 477. I have not been able to refer to the reports from which the above citation from the Digest purports to have been taken. If the principle is truly stated in the Digest, it is certainly broad enough to embrace the present as a proper salvage claim.

In reference to the amount of the compensation in salvage cases, there is no fixed rule. It is always to be determined by the sound discretion of the court. In the case of the *Adventure*, 8 Cranch R. 221; 3 Cond. R. 93. Mr. Justice JOHNSON, in delivering the opinion of the court, says: "It (the amount to be allowed) must in every case depend upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, etc., all of which

must be estimated, and weighed by the court that awards the salvage." Again: "As far as our inquiries have extended, where a proportion of the thing saved has been awarded, a half has been the maximum, and an eighth the minimum; below that, it is usual to adjudge a compensation *in numero*." The reward should be such as not only to afford an ample remuneration to the salvor for the risk of life and property, and for the labor, privations and hardships encountered, but so liberal as to furnish a sufficient incentive to similar exertions by others." 1 Conk. Ad. 282; 1 Sumner's Rep. 400, 413. "If the property saved is of great value; or if it was in a condition apparently hopeless, but for the interposition of the salvors; or if the service was undertaken with alacrity, and executed with a high degree of skill and energy; or if it involved extraordinary peril, or required severe and exhausting labor, the retribution ought to be proportionally liberal. The opposite of either of these circumstances ought, consequently, to produce the opposite effect." 1 Conkling's Ad. 285, and the authorities there cited.

But the claim of this libelant cannot be viewed as of the highest order of merit, and as entitling him to a high rate of compensation. His conduct was certainly praiseworthy, and such as to give him a fair claim to remuneration beyond the ordinary pay of a master, but there was not the personal risk, exposure, hardship and labor, nor is there the certainty that the property was saved through his interposition, that will justify a large allowance to him as a salvor; and it may not be improper here to remark, that in salvage claims arising on the western rivers, the precedents of courts administering the admiralty law on the ocean, in regard to the amount of compensation, cannot be safely adopted. In general the peril of life in cases of disasters on our rivers, affording a claim for salvage service, is not equal to those resulting from disasters on the ocean.

Upon the whole view of the case, the court adopt the suggestion of Mr. Justice JOHNSON, in the case above referred to, and award a compensation *in numero*, to the libelant, instead of any fixed percentage, or proportion of the value of the property. And this amount is fixed at five hundred dollars, to be assessed

The Atlantic and Ogdensburgh.

upon the boat and cargo, according to their value at the port of Cincinnati.

Upon the question of jurisdiction, the court has only to remark, that the opinion of the Supreme Court at its last session in the case of the *Genesee Chief et al. v. Fitzhugh et al.*, 12 How. Sup. Court R. 443, is regarded as decisive. The decision in that case is authoritative in all the courts of the Union. By it the doctrine is settled, "that the admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States is not limited to tide waters, but extend to all public navigable lakes and rivers, where commerce is carried on between different states or with a foreign nation."

EBER B. WARD *et al.*, Owners of the STEAMBOAT ATLANTIC *v.*
THE PROPELLER OGDENSBURGH and CHAMBERLAIN & CRAW-
FORD, Owners.

District Court of the United States. District of Ohio. In Admiralty.

HON. H. H. LEAVITT, JUDGE.

1. The maritime law is rigid in its exactions of unremitting care and vigilance on the part of those intrusted with the navigation and safe keeping of vessels of every kind, to avoid accidents and injuries by collision. Any negligence, inattention or want of skill, resulting in injury to others, will entitle the sufferer to remuneration.
2. Where, in the night time, a steamer like the Atlantic, of great power and speed, there being a haze or fog on the lake, making it difficult to distinguish objects at any considerable distance—on a route, and at a point on such route much frequented by vessels and steamers, going at a speed of fifteen miles an hour, the second mate and wheelman being the only officers on deck, and they both in the pilot-house; *held*, that the Atlantic did not maintain a sufficient look-out.
3. A competent and vigilant look-out, stationed in the forward part of the vessel, with an unobstructed view, is indispensable to exempt the steamboat from blame in case of accident in the night time, while navigating waters on which it is accustomed to meet other water craft. Nor is the inside of the wheel-house the proper place for the stationing of a look-out.
4. In general, it is the duty of vessels, whether propelled by steam or wind, when

The Atlantic and Ogdensburgh.

meeting dead ahead, or nearly so, to port helm, and each turn to the right. But if they are passing with berth enough to exclude the possibility of their coming together, each pursuing their onward course, they are not required to port helm. Porting the helm under such circumstances may be a fault.

5. When steam vessels are approaching each other, and from the darkness or fog, there is uncertainty as to the course and position of the other, it is the duty of each instantly to check the speed, and then if necessary to stop and back.
6. When by consent of parties, the answer of the respondent stands as a cross libel, the court may, if a proper case is made, decree full damages for the respondent against the libelant.
7. Under Rule 15, of the admiralty, the libelant may proceed: 1st, against the ship and master; 2d, against the ship; 3d, against the owner alone; 4th, against the master alone. A proceeding *in rem* against the ship, and *in personam* against the owner, not being authorized by the rule, is prohibited.

Lothrop, Swayne, Wade & Newberry, for libelants.

Spalding, Stanberry, McNett & Kimball, for respondents.

This was a libel for collision, brought by the owners of the steamboat *Atlantic*, a large, first class passenger steamboat, running between Buffalo and Detroit, against the propeller *Ogdensburgh*, a freight boat running from Cleveland through the Welland canal to Ogdensburgh, and against the owners of the boat; the libel being *in personam* and *in rem*. The facts of the case will be found so much at large in the opinion of the judge, that it is not necessary to repeat them here. The respondents excepted to the libel for a misjoinder.

Spalding, in support of the exception, citing 1 Conk. Ad. § 380 to 386; 2 Story, 16; 3 Haggard, 114; Supreme Court Rules in Admiralty, 15; Benedict, 215, § 391; *Schooner Hope*, 1 Robinson, jr. 154; *The Volant*, do. 385; 5 How. 441; Laws of 1842, U. S. Statutes; 2 Wood & Minot, 92.

Lothrop, in reply, citing for analogies, 1 Mason, 508; 2 Story, 16; ditto, 57; 2 Story, 81; Benedict's Admiralty, §§ 387, 396, 397.

After a full argument, the judge reserved his opinion to be incorporated in the final decree. The testimony in the case was then taken, occupying seven days.

On behalf of libelant, the following references were made:

The Atlantic and Ogdensburgh.

Abbott on Ship. 236, mar. p.; for the Rules of the Trinity, 9 and 10 Stat. of Vict.; Abb. on Ship. 237; Story on Bail. § 611 b; *Schooner Friend and Menai*, 1 Wm. Rob.; *The Sciota*, Davies' Rep. 364, 365. There are four classes of circumstances under which collision may occur. 1. Inevitable accident; neither party to blame. 2. Where both parties in fault. 3. Where suffering party alone is to blame. 4. Where the fault is in the party doing the damage. *The Woodrop Sims*, 2 Dodson, 83; Story on Bail. 608 *et seq.*; *Reeve v. The Constitution*, Gilpin Rep. 579; 1 Conk. Ad. 300, 301, 303; Abb. on Ship. 229; *Brig Rival*, 8 Law Reporter, 375; Story on Bail. 611; 2 Wend. 452; 19 Wend. 397; 10 How. 584, 605; 13 How. 108.

On behalf of respondents, the following references made. 2 Dodson, 83; 2 Rob. jr. 217; *The Emerald*, Blatch. Cir. Ct. R. 236; *The Northern Indiana*, Manuscript Decision of Judge HALL of N. Y. 1852; *Waring v. Clarke*, 5 How. 498; *The Europa*, 2 Eng. Law and Eq. Rep. 557; *St. John v. Paine*, 10 How. 507; *The James Watts*, 2 Robinson, jr. 270; 3 Rob. 75; Wharton's Dig. 388; 4 McLean, 286-9; *The Rose*, 2 Rob. R. 2; *The Iron Duke*, 2 Rob. jr. 377.

LEAVITT, J.—The libelants aver substantially, that the steamboat Atlantic, being of eight hundred tons burthen, with passengers and freight on board, left Buffalo on the evening of the 19th of August, 1852, for Detroit, and proceeding on her voyage across the lake, by the usual and direct route, with all her signal lights burning and in good condition, about half past two o'clock on the morning of the 20th of August, off Long Point, on the Canada shore, was run into with great violence by the propeller Ogdensburgh, then on her way from Cleveland to the entrance of the Welland canal; the said steamboat being struck on her larboard side, near the forward gangway, and the guard and hull being so broken that she filled with water, sunk, and was a total loss to the libelants. It is also averred, that at the time of said collision, the Ogdensburgh did not have lights burning and properly displayed, as required by law; and was not then steering on the usual and proper route from Cleveland to the Welland canal; and that on the approach of the Atlantic, though

clearly visible for at least two miles, the propeller did not stop her engine, lessen her speed, alter her course, or take any other precaution to avoid a collision. It is also alleged, that the officers and crew of said steamboat, as the propeller approached, first put the helm a-port, and then hard a-port, to get out of the course of the propeller, and used every effort to prevent a collision; but that the propeller, although seeing the light of the Atlantic at a great distance, did not port her helm or slacken her speed, or display lawful signal lights, but was so unskillfully and improperly managed, that she was run nearly at right angles into and against the Atlantic; and that the collision resulted from the carelessness, negligence and unskillfulness of the officers and crew of the said propeller; and that the libelants have sustained damage thereby to the amount of one hundred thousand dollars.

The answer of Chamberlain and Crawford, claimants of the Ogdensburgh, which they aver to be a propeller of three hundred and fifty-three tons burthen, sets up in substance, that she left Cleveland with a heavy freight, about twenty minutes after twelve o'clock on the afternoon of the 19th of August, 1852, and proceeded by way of Fairport, towards Ogdensburgh, New York, the place of her destination, which was to be reached by means of the Welland canal, in Canada: that about two o'clock the next morning, steering her proper course, northeast by east, for the entrance of said canal, the wind being light from the southwest, and the weather somewhat hazy, her watch on deck discovered a steamboat light, from two to three points off her starboard bow and at the supposed distance of three miles: that keeping on her course at a speed of about seven miles an hour, her mate ascertained that the light was nearing her, and gave the signal "to slow" the engine, which was done, and the light still coming nearer, an order was given to stop: that finding the boats were in danger of collision, the engine of the propeller was reversed, and she was backed: that these orders were given with all possible dispatch, but in spite of all these precautions a collision ensued."

The answer then avers, that by reason of the Atlantic's turning from her proper course, and continuing with unabated speed

The Atlantic and Ogdensburg.

fifteen miles an hour, in a direction across the bow of the propeller, she fell with all her momentum upon the propeller's stem wrenching it out of place, and carrying her half around. It is charged, that the collision was wholly caused by the unparalleled recklessness of the persons in command of the Atlantic; and that those navigating the propeller managed her according to the approved rules of lake navigation, and with a due regard to the safety of both vessels. It is also averred, that the propeller had all her lights burning, and displayed as required by law.

The claimants ask for a decree for the injury sustained by the propeller as the result of the collision, and by the agreement of the parties, such a decree is to be rendered in this case, if in the judgment of the court the claimants are entitled to compensation.

It is also further agreed that the value of the Atlantic was seventy-five thousand dollars, and is to be so considered by the court, if it shall be adjudged that the libelants are entitled to a decree in their favor.

The matters in controversy in this case are indicated by the foregoing summary statement of the libel and answer.

A great mass of testimony, partly oral and partly in the form of depositions, has been exhibited to the court, in support of the opposite claims of the parties, and as usual in investigations growing out of marine collisions, there is, in some material points, great conflict in the testimony. Without noticing the large portions of the evidence which have no direct bearing on the points in dispute, I shall refer to that only which forms the basis of the conclusions to which I have been led.

But before noticing the facts, it will be proper to state some of the settled doctrines of the maritime law as to collisions. Lord STOWELL, justly distinguished for his eminent ability as an admiralty judge, classifies the cases in which collisions may occur, as follows:

"In the first place a collision may happen without blame being imputable to either party, as when the loss is occasioned by a storm, or other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.

"Secondly, a misfortune of this kind may arise when both parties are to blame, where there has been want of due diligence or skill on both sides. In such case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.

"Thirdly, it may happen by the conduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden.

"Lastly, it may have been the fault of the ship which ran the other down; and in this case, the innocent party would be entitled to an entire compensation from the other." 2 Dodson's Ad. R. 83; Abbott on Shipping, 230 marginal paging.

It is clear, from the general phase of the present case, that it does not fall within the first classification. The disastrous collision under consideration did not happen through an agency beyond human control. There is a fault resting somewhere; a wrongdoer chargeable with want of skill, or inattention to duty.

The libelants insist that they are the losers of their valuable steamboat and her appendages, by reason of the mismanagement of the Ogdensburgh. The respondents, on the other hand, insist not only that they are not to blame, but that they are entitled to compensation for the injury sustained by them, as the result of the collision.

To make good their claim to indemnity, the libelants must show that the collision was caused by the fault of the other party, and that no censure attaches to those charged with the management and navigation of their boat. And, if the respondents would show a just ground of claim for remuneration for their loss, it must appear that they are without fault. I think there is no foundation for holding that the present is a case of mutual culpability, calling for an apportionment of the loss between the parties.

The maritime law is rigid in its exaction of unremitting care and vigilance on the part of those intrusted with the navigation and safe keeping of vessels of every kind, to avoid accidents and injuries by collision. Any negligence, inattention, or want of skill resulting in injury to others, will entitle the sufferer to remuneration.

These are general and admitted principles touching the rights and liabilities of parties in cases of collision. It is now proper to inquire what is the result of their application to the facts of this case.

The facts as exhibited in the evidence of the opposing parties, are in some essential particulars, widely variant. On the part of the libelants, the material facts proved may be summarily stated as follows. The steamboat *Atlantic*, the property of the libelants, being a first class passenger boat on Lake Erie, of the tonnage before stated, and with an engine of a thousand horse power, navigated and managed with the usual complement of officers and hands, having on board, including passengers and crew, between five and six hundred persons, and furnished with the lamps and lights required by law and the usages of lake navigation, left the port of Buffalo about, or a few minutes after nine o'clock in the evening of the 19th of August last, on her regular trip to Detroit. It seems according to the usual course of navigation by steamers between the places named, that Point au Pelee, putting out from the Canada shore near the upper end of the lake, is the terminus of a direct line usually pursued; the course from Buffalo to that point bearing southwest by west. This line of navigation runs within a short distance of Long Point, on the eastern extremity of which there is a light-house. This is sixty-eight or seventy miles from Buffalo. On the night in question, the *Atlantic* pursued the usual course of steamers, and came abreast of Long Point light-house about two o'clock. It was a star-light night, but a haze or smoke hung over the lake, extending upward from twenty-five to thirty feet, which rendered it difficult to discover objects involved in it to any considerable distance. The second mate of the boat was on watch from the time of leaving Buffalo until the collision.

It was the starboard watch, as it was called by mariners, and belonged properly to the master, who, on this occasion, does not seem to have been on deck during his entire watch. The second mate and wheelsman were joined on deck at 12 o'clock by a passenger who had some experience as a navigator on the lakes. According to the testimony of these three persons, after the *Atlantic* had proceeded about one mile beyond Long Point

light, a little after two o'clock, they made a light, two white lights, which the mate took for the lights of a sailing vessel heading southward. These witnesses agree in the statement, that the steamer holding on her course southwest by west, made the lights seen from a half to three-quarters of a point over her larboard bow, indicating that the position of the approaching craft was a little south of the steamer's course. The lights, when first seen, in the opinion of one of the witnesses, were about one mile distant. The steamer kept her course, under a full head of steam, at a rate of not less than fifteen miles an hour, when it was ascertained distinctly, that the lights seen belonged to a propeller steering for Gravelly Bay, through which the entrance into the Welland canal is reached. The steamer continued to approach without any diminution of her speed, until within three or four lengths of the boat from the propeller, when the order was given to the wheelsman to port his helm, which was almost immediately succeeded by the order to put the helm hard a-port. Very soon after, the Atlantic's larboard side just aft the forward gangway, came violently in contact with the propeller's bow, causing a breach in the steamer's side some seven feet in width, extending downward below the water line, and inward nearly to the middle hatch. Without stopping the engine, the order was given to head her to the shore, and after running between half a mile and a mile, such was the rapid inflow of the water, that she sunk at a point where the lake is twenty-five fathoms deep.

Such is the case very briefly stated as presented by the witnesses for the libelant. On the part of the respondent, the witnesses produced are the master, wheelsman, first mate, clerk, engineer and fireman on the Ogdensburgh. In the first place, it may be remarked, that they satisfactorily disprove the allegation in the libel, that the propeller was not furnished with, and did not display, on the night of the collision, the red and green signal lights required by statute. The boat was provided with these lights and they were suitably displayed and lighted.

The Ogdensburgh, in addition, had two white globe lights on her cross-trees, together with several lesser lights. These it is

The Atlantic and Ogdensburg.

in proof, were all lighted, and in good order throughout the night on which the collision occurred.

It appears that starting off across the lake, from a point a few miles off Ashtabula, on the southern shore, the propeller was put on her proper course, northeast by east, for the entrance of the Welland canal; and that, although there had been previously a slight variation from it, she was on it, when the lights of the steamer were made, and continued upon it till the collision happened: that the lights of the Atlantic were first made by the propeller two and a half points over her starboard bow, and at the estimated distance of two and a half or three miles: that the mate having first taken the bearings of the light by the compass, and seeing that the light opened a few points on the starboard, had ordered the wheelsman to keep on his course, and immediately thereafter, being uncertain as to the bearings of the steamer's lights, gave the order to slow the engine: that after watching the lights closely for a short time, the mate saw the red signal lights of the steamer, and ascertaining that she was within four or five times her length of the propeller, rang the bell to stop and back almost simultaneously: that before the order to slow, the propeller was running at the rate of eight miles an hour: that after the order to slow, and when the orders to stop and back were given, her speed had been reduced to about three miles an hour: that all the orders referred to had been promptly obeyed, and the propeller brought almost, if not wholly to a stand: that the Atlantic, without either slowing or stopping, continued her course towards the propeller, heading, as the nautical term is, "stem on:" that the mate seeing the collision inevitable, gave the order to starboard the helm, hoping thereby to receive only a glancing blow, but this movement produced but little or no effect, as the propeller was stopped, or nearly so, and of course did not obey her helm. The Atlantic then struck the bow of the propeller, causing the breach in the steamer before noticed, and carrying away the lower part of the propeller's stem, loosing and turning the other part from its position, unfastening the ends of the planks, and causing an opening through which the water found its way into the boat.

This synopsis of the testimony on both sides, as to the course and relative positions of the boats, when the lights of each other were made, their subsequent conduct, and the facts relating to the collision, will suffice to show the material discrepancies between the witnesses on either side, and afford some intelligible land-marks for the court, in settling the rights of the parties.

It will be noticed, that the essential differences between the parties, consist in the opposite statements of the witnesses, as to the bearings of the lines, on which the steamer and the propeller neared each other. On the hypothesis of the libelants, the lights of the propeller were first seen, in seaman's phrase, nearly dead ahead of the Atlantic, being less than a point over her larboard bow. Thus meeting, if the Atlantic had exercised the proper precaution of checking her speed, and porting her helm, and the propeller had failed to use the proper prudential measures, a collision being the result, the fault would be chargeable to the latter. But, on the respondents' proof, the lights of the steamer were seen two and a half points over the propeller's starboard bow, indicating clearly, that she was on her proper course, north of the steamer's line of travel; and that by improperly porting and hard porting, the steamer had turned too far north, and carried across the propeller's bows. This latter supposition, I am obliged, as the case is presented, to adopt. I have failed to perceive any reason why the statements of the respondents' witnesses, as to the matters in which they are in conflict with those of the libelants, should be repudiated. They are not only more numerous, but for reasons of a higher and more decisive character, better entitled to credit.

In this view, how stands the case? The propeller has done all that reason, usage or law required. The many experienced and highly intelligent navigators who have testified as experts, have declared, with one voice, that every precautionary measure adopted by her, was sensible and judicious. She did all in her power to avoid the collision, while she omitted nothing that could have been done. True, the order given by her mate to starboard the helm just preceding the collision, was not called for; but for the reason before stated, it produced no result, and may well be designated as an "error," not "a fault."

The Atlantic and Ogdensburgh.

In coming to this conclusion, I am not unmindful that it was urged strenuously in the argument, that by the settled usage of navigation, as also by the judicial determinations, it is the duty of vessels, whether propelled by steam or wind, when meeting "dead ahead," or nearly so, to port the helm, and each turn to the right. There can be no doubt of the existence of this rule, or of its obligatory nature; but it must be limited to cases in which it properly applies. The experts who were questioned on this subject, agree in stating that if two boats or vessels are approaching in opposite directions, yet with berth enough to exclude the possibility of coming together, each pursuing their onward course, they are not required to port helm. Indeed, they agree in stating what is clearly obvious, that in the case supposed, the porting helms would tend rather to bring about, than avoid collisions. These experts also say, that under the circumstances under which the Atlantic and Ogdensburgh approached, the latter was not required to depart from her course, and that the Atlantic was wrong in porting her helm, and diverging from her track.

It is clear, then, that the libelants have no claim to compensation from the owners of the Ogdensburgh, for the whole or any part of the loss sustained by them, as a result of this disastrous collision. It remains to inquire whether a decree shall pass against the libelants for the loss suffered by respondents in the injury to the propeller.

By agreement of parties, the question whether it is competent in a proceeding by libel, when the answer, as in this case, asserts a claim against the libelant, and prays for a decree accordingly, to treat it as a cross libel, is waived; and it is stipulated that a decree may be entered for the owners of the Ogdensburgh, if, in the opinion of the court, they are entitled to it on the law and facts of the case. The right to such a decree depends clearly on the answer to the inquiry, whether their loss is attributable to the sole fault of the libelants' steamer. That the libelants are great sufferers from the collision, and have chosen to initiate this proceeding, cannot deprive the owners of the propeller of their claim to compensation, if they are chargeable with no fault. They are to be viewed precisely as if they were the

150 DISTRICT COURT OF THE UNITED STATES.

The Atlantic and Ogdensburgh.

libellant seeking indemnity for a loss; and if they make out a good case, are entitled to a decree in their favor.

The inquiry is then presented, whether the facts and the law applicable to them, show a case of such exclusive culpability on the part of the Atlantic, as not only to preclude her owners from any right to compensation, but to make them responsible for the injury sustained by the Ogdensburgh. This is contended for by the respondents' counsel, on several grounds.

1. It is insisted that the Atlantic had no sufficient watch on deck during the night of the collision. The night, as already noticed, was not dark, but the haze on the lake made it difficult to distinguish objects at any considerable distance. The route of the steamer, especially in the vicinity of Long Point Light, was one much frequented by vessels and steamboats passing up and down the lake, and to and from points along the southern shore, by propellers and other crafts carrying on commerce with the lower lakes through the Welland canal. The Atlantic was a steamer of great power and of great speed; and on the night referred to, was the freighter of between five and six hundred human beings. These facts are quite sufficient to justify the conclusion that those intrusted with her management and navigation were called upon for the exercise of great watchfulness and care. It seems the only persons on deck having any rightful connection with the steamer, from the time she left Buffalo until the occurrence of the terrible collision which sent her to the bottom of the lake, and occasioned the loss of some two hundred lives, were the second mate and the wheelsman. As before noticed, it was the captain's watch, and the testimony of the most experienced and reliable experts is, that under the circumstances of the case, it was wholly improper that the captain should have intrusted the care of the boat to the sole management of the second mate—an officer in whom the higher qualifications of a navigator are not looked for, and who, in the language of a very intelligent expert, is viewed as the mere "drudge" or assistant of the captain. In point of fact, the second mate, even if his competency for the station is admitted (which is, at least, doubtful), did not keep a vigilant look-out, within the requirements of the decisions of the highest tribunals of the country. He

was, by his own statement, in the pilot-house, at the time he made the lights of the propeller, looking from one of the windows; and did not make these lights till they were about one mile distant.

In the case of *St. John v. Paine and others*, 10 Howard's R. 557, it was said by Judge NELSON, in delivering the opinion of the court, that "the steamboat was in fault in not keeping, at the time, a proper look-out on the forward part of the deck; and that the failure to descry the schooner at a greater distance than half a mile ahead, is attributable to this neglect. The pilot-house in the night, especially if dark, and the view obscured by clouds in the distance, was not the proper place, whether the windows were up or down. The view of a look-out stationed there must necessarily be interrupted." And in the same case, the court held "that a competent and vigilant look-out, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching, at the earliest moment, is indispensable to exempt the steamboat from blame in case of accident in the night time, while navigating waters in which it is accustomed to meet other water craft." And again, the court said: "There is nothing harsh or unreasonable in this rule; and its strict observance and enforcement will be found as beneficial to the interests of the owner as to the safety of navigation."

In the case of the *Propeller Genesee Chief v. Fitzhugh and others*, 12 Howard Rep. 443; 9 Western Law Journal, 391; in giving the opinion of the court, Chief Justice TANEY says: "It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant look-out besides the helmsman. It is impossible for him to steer the vessel, and keep the proper watch, in his wheel-house. His position is unfavorable to it, and he cannot safely leave his wheel to give notice, if it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other look-out than a helmsman, or that such look-out was not stationed in a proper place, or was not actively and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault."

152 DISTRICT COURT OF THE UNITED STATES.

The Atlantic and Ogdensburgh.

In a recent case in admiralty, against the steamboat Northern Indiana, a passenger boat on Lake Erie, decided by Judge HALL, of the District Court of the United States for the northern district of New York, it was held that the mate alone, while the officer of the deck, though in all respects competent to the duty, did not constitute a sufficient look-out, within the requirements of the decisions of the Supreme Court of the United States, referred to. The judge remarks that "the mate was the officer of the deck, holding the temporary command of the vessel, and liable to be continually called to the discharge of duties inconsistent with the keeping of a constant and vigilant watch, and ought not to have been relied on for that purpose."

In England the rules prescribed by the courts in regard to look-outs, are more stringent than in the United States. A case is reported in Volume II Eng. Law and Equity R. 557, in which the Europa, one of the Atlantic steamers, was condemned for an injury to a sailing vessel occurring during a thick fog, on the route of steam travel between the United States and England, on the ground of the insufficiency of her look-out; when the proof was that there was an officer stationed on the bridge, a quarter master on the top-gallant forecastle, another quarter master at the con, besides one at the wheel.

I cannot hesitate to say, in view of these authorities, that the Atlantic did not maintain a sufficient look-out on the night of the collision.

2. In the next place, it is urged that the steamer was guilty of a great error in porting, and then hard porting her helm, thereby running across the bows of the propeller so as to make the collision an almost certain result. It has been before stated, that in the relative positions and courses of the two vessels, and the time the lights of each were made by the other, there was no obligation on the propeller to port her helm. From the width of the berth between the two boats, if each had its course, there could by no possibility have been a collision. They would have passed at a distance probably not less than a mile apart. The law, therefore, requiring vessels and boats approaching on the same or near the same line, to port their helms, as already remarked, does not apply. And it was palpably wrong in the

steamer, and necessarily attended with danger, to port her helm, and diverge from her course, especially without checking her speed. The movement indicated great want of skill and judgment in navigation. The steamer should have given way, as the nautical phrase is, and have passed under the stern of the propeller. 2 Robinson, jr. 5.

§. But another fault, very much insisted on by the advocates of the respondents, was the omission of the mate to check the speed of the Atlantic. There is no pretence that any order to that effect was given, or that in fact the velocity of the boat was at any time checked. This gross dereliction of duty of the mate of the Atlantic, if chargeable with no other, would, under the circumstances of this case, make the boat responsible for all the consequences which followed. It is entirely without excuse or palliation. It is proved that the boat at the time of making the propeller's lights, was going forward under high steam pressure, and her rate of travel was not less than fifteen miles an hour. Her mate says, that from the haze on the lake, he did not see the propeller's lights till within about a mile of her, and concluded when first seen, they were on a sailing vessel going south. Yet, notwithstanding the difficulty of vision, and the uncertainty that existed as to the character of the craft, and the direction of her course, her light seen, as he says, less than one point over the steamer's larboard bow, he pressed on with criminal recklessness, and without the least reduction of her dangerous speed. The numerous experts who have testified in this case, as well those called for the libelants, as for the respondents, agree in saying, it was the obvious duty of the Atlantic's mate, when the propeller's lights were first made, if, after noticing their bearing, there was the least uncertainty as to their position and motion, instantly to check the speed of the steamer, and then, if necessary, to stop and back. They agree also in saying, if this course had been pursued, there was not a possibility that a collision could have happened. The propeller pursuing her course northeast by east, would have passed beyond the reach of the steamer, and the frightful calamity that took place would have been avoided. And it is amazing that a course so plain and safe had not suggested itself to the mate. That in-

stead of this, he should have crowded the helm hard a-port and with unchecked velocity, turned a steamer almost across the path of the propeller, imports a recklessness and stupidity that argue badly for his fitness for the truly responsible position he occupied.

It was not deemed necessary to notice specially the judicial decisions, both in England and in this country, enforcing rigidly the obligations and duties of those connected with steam navigation. Many of these were presented and ably commented upon by the advocates of the respondents in the argument of this case. In addition to those noticed in the previous part of this opinion, many others were adduced of pertinent application to this subject. Among them the following are noted: *The Europa*, 2 English Law and Equity R. 557; *Genesee Chief*, 12 How. 443, 9 Western Law Journal, 391; *The Rose*, 2 Robinson, jr. 1; *The Virgil*, 2 Hazard, 356; Davies' Rep. Maine, 197, Whart. Dig. 1852, Sup. 388.

The general tendency of these authorities is to enforce the duty of great caution and unremitting vigilance, on the part of those engaged in the navigation of vessels propelled by steam. The obligation of lessening the speed of steamboats, under all circumstances, when unchecked may be supposed to be dangerous, is especially enjoined. And there can be no question that the preservation of human life, as well as of property, demands at this day, when there is such a disposition to sacrifice everything to rapidity of movement, that owners and managers of steamboats should be held to a most rigid accountability.

I cannot well conceive of a case calling more urgently for the application of these principles than the one under consideration. The calamity which has befallen the ill fated Atlantic, putting in the most imminent peril the lives of upward of five hundred persons, and attended with the actual loss of more than two hundred, has resulted from an insane neglect of duty in not checking her rapid speed at the proper time, and a desire to make headway at all hazards. And it is certainly a somewhat singular feature of this case, that her owners responsible morally and legally, for the misconduct and incompetency of the officers and agent whom they had placed in charge of their boat, should

The Atlantic and Ogdensburgh.

ask remuneration for a loss arising clearly from their recklessness or unskillfulness. As to the master of the Atlantic, some conclusion may be drawn in relation to his professional character and qualifications, from the fact that, although it was his watch, it does not appear that he was on deck from the time the boat left Buffalo till he was roused from his slumber by the fatal collision; and afterwards was distinguished for his "masterly inactivity," in everything but the carrying out of measures to save his own life. The second mate, who was invested with the sole management and command of the boat, and to whom was committed the safe keeping of more than five hundred persons, was not qualified for his trust, as is apparent from the facts already noticed. In a word, it is impossible to review the incidents of that sad catastrophe without a painful impression that those occupying official stations on the Atlantic, were grossly deficient, not only in professional skill and intelligence, but in the higher moral powers of trustworthy navigators.

Under the belief that the foregoing views sufficiently indicate the grounds on which it is designed to place the decision of this case, I forbear to notice some other points made in the arguments. In my judgment, the libelants on the law and the facts, are not entitled to a decree, either for the whole, or any part of the value of the steamer Atlantic; and the respondents have a just claim to compensation for the injury sustained by the Ogdensburgh, arising from the faulty management of the Atlantic. The amount of this injury, by agreement of parties, is three thousand dollars; for which sum I decree against the libelants, with costs.

In connection with this case, a preliminary question of admiralty practice is presented by the first article of the respondents' answer, as matter exceptive to the libel, which is stated as follows:

"That the libelants have improperly joined a proceeding *in rem* against the propeller Ogdensburgh, with a proceeding *in personam* against the respondents as her owners."

This point was argued fully before the hearing, and reserved for further consideration. Its decision now is no way material to these parties, as the court has decreed in favor of the respond-

ents on the merits. It may be desirable, however, that the views of the court on the point raised should be known, that the practice hereafter may conform to them.

After an examination of the authorities cited, in connection with rule 15, of the rules adopted by the Supreme Court of the United States, for the practice of the admiralty courts of the Union, I am satisfied that the joinder in the same libel of a proceeding *in rem*, against the ship, and *in personam* against the owner, in an action for damages by collision, is not admissible. In one case, before Judge STORY, prior to the adoption of the rules of the Supreme Court, he expressed himself strongly against the propriety of such a joinder.

The case referred to is *The Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story's Rep. 57. In the opinion delivered by Judge STORY in that case, he remarks: "In the course of the argument, it has been intimated that in libels of this sort, the proceeding might be properly instituted, both *in rem* against the steamboat, and *in personam* against the owner and master thereof. I ventured at that time, to say, that I knew of no principle or authority, in the general jurisprudence of courts of admiralty, which would justify such joinder of proceedings, so very different in their nature and character and decretal effect. On the contrary, in this court, every proceeding of this sort has been constantly discountenanced, as irregular and improper." Again, the judge says: "In cases of collision the injured party may proceed *in rem* or *in personam*, or successively in each way, until he has full satisfaction. But I do not understand how the proceedings can be blended in one libel."

The case referred to was before Judge STORY in 1841. At the January term, 1845, the Supreme Court, in pursuance of express authority conferred by act of Congress, prescribed the rules of admiralty practice. Rule 15 is as follows: "In all suits for damages by collision, the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone *in personam*."

There seems to be no room for doubt as to the true construction of this rule. It is understood these admiralty rules were drafted by Judge STORY; and the rule above quoted, was de-

signed to carry out his views of the correct practice, as very clearly stated in the foregoing extract from his opinion. The rule provides specifically how the party may be proceeded against for an injury by collision. It may be: 1st, against the ship and master; 2d, against the ship; 3d, against the owner alone; 4th, against the master alone *in personam*. Clearly a proceeding *in rem* against the ship, and *in personam* against the owner, not being authorized by this rule, is prohibited.

The rule quoted was thus understood and construed by the late Judge WOODBURY. In 2 Woodbury & Minot's Rep. 92, in delivering the opinion of the court he says: "The other objection is the misjoinder of the vessels and the owners in the same libel. This involves a proceeding *in personam* and *in rem*, in the same case, and contravenes the settled rules of admiralty proceedings." He refers to rule 15, before cited, and also the 17th rule, as sustaining his views. Judge CONKLING, in his work on admiralty Vol. II, 380 *et seq.*, after discussing the question, whether before the adoption of the rules of the Supreme Court, a proceeding *in rem* and *in personam* could be joined, holds, that the practice, if it was before allowable, is abolished by rule 15.

I see no reason to doubt the conclusion, that at least, in suits for collision, it was the intention of the Supreme Court to direct what proceedings were admissible; and in pointing out the course which they regarded as proper, to prohibit all others.

The exception to the libel is therefore sustained, and the libellants have leave to amend.

NOTE.—This case was taken by appeal to the Circuit Court for the district of Ohio. At the November term, 1856, Judge M'LEAN reversed this decree, and finding both vessels in fault, decreed each to pay a moiety of the damages. The opinion of Judge McLEAN will probably be published in 7 McLean. From the decree of the Circuit Court, both parties appealed to the Supreme Court at Washington. The cause will probably be heard at the December term, 1857.—EDITOR.

158 DISTRICT COURT OF THE UNITED STATES.

The Fanny Fern and The Thomas Swann.

M. E. LUCAS, Owner of STEAMBOAT FANNY FERN v. THE
STEAMBOAT THOMAS SWANN.

District Court of the United States. District of Ohio. In Admiralty.

HON. H. H. LEAVITT, JUDGE.

1. A libellant claiming damages on the ground of a collision with another boat, must make it appear that there was no want of ordinary care and skill, in the management of his boat, and that the injury for which he claims compensation, resulted from the sole fault of the other boat. But the faulty management of one boat, will not excuse the want of proper care and skill in the other.
2. A case of damage resulting from inevitable accident, is defined to be "that which a party charged with the offence could not possibly prevent, by the exercise of ordinary care, caution and skill."
3. There is no ground for the conclusion in this case, that the injury was unavoidable; but on the contrary, it is a case of mixed or mutual fault.
4. But to constitute a proper basis for a decree apportioning the damages equally to each boat, as in a case of mixed or mutual fault, the evidence must enable the court to find the specific faults of each, from which the injury resulted.
5. If the court is satisfied that both boats were in fault, and yet, from the conflict in the evidence, cannot find, with reasonable certainty, the specific faults of each, it constitutes a case of inscrutable fault; and, in such case, in accordance with the law as settled in the United States, a decree for the equal apportionment of the damages resulting from the injury may be entered.
6. The present is adjudged to be such a case, and a decree is entered in accordance with the principle stated.

Walker, Kebler & Force, for libellants.

T. D. Lincoln, for respondents.

LEAVITT, J.—This is a case in admiralty, brought by the libellants, as owners of the steamboat "Fanny Fern," to obtain compensation for an injury to that boat, by a collision with the steamboat "Thomas Swann," of which the respondents are the owners.

This collision occurred a little after 4 o'clock in the morning of the 28th of February, 1854, on the Ohio river, some ten or twelve miles below Wheeling, in the channel between Little

The Fanny Fern and The Thomas Swann.

Grave Creek Bar and the Ohio shore, near the head of the bar, and at the distance of something upwards of one hundred yards from that shore. The Fern was a stern-wheel boat of about four hundred and fifty tons burden; the Swann is a side-wheel boat, of the largest class of Ohio packet boats, and was, at the time of the collision, one of the boats of the Union line, from Louisville to Wheeling.

The libelants allege, that as the result of the collision, their boat immediately sunk in fourteen feet of water; and they claim damages for the full value of the boat, as being a total loss. They also allege, that the injury to the Fern was caused solely by the fault and misconduct of those having charge of the respondents' boat; and set forth as the foundation of their claim for indemnity, that the Fern was descending the river, in the proper and usual place of a descending boat, a short distance above the head of the Grave Creek Bar, and that her pilot, noticing the lights of a boat coming up near the Ohio shore, and having no signal from her, when the boats were within from a quarter to less than a half a mile of each other, gave two taps of the large bell of the Fern, thereby indicating his wish to take the left-hand side of the channel. The ascending boat proved to be the Swann; and the libelants aver, that she made no response to the Fern's bell, and that the Fern continued her course down, in her proper place, when her pilot, seeing the Swann veering across the channel, towards the Virginia side, promptly gave the order for stopping and backing: that the boat was stopped and backed, and every precaution used to prevent a collision; but that the Swann, wrongfully pursuing her course across the channel, struck the Fern nearly at right angles, on the starboard side, near the foot of the stairs, about fifteen feet from the bow of the boat, cutting her about two-thirds through, and causing her to go down in less than one minute.

The respondents, on the other hand, deny that there was any fault or misconduct on the part of those having charge of their boat; and insist that the Fern, before entering the channel between the bar and the shore, was not in the proper place of a descending boat, being not more than thirty yards from the Ohio shore, and so near thereto, that in the line of vision from

the pilot-house of the Swann, the lights of the Fern were so blended with the lights on shore at that point, that they could not be distinguished; and that from this cause the pilot of the Swann did not know, and had no reason to suppose, that a boat was coming down, till the bell of the Fern was heard, at which time the boats were not more than two hundred or two hundred and fifty yards apart; and that instantly, on being apprised that a boat was coming down, the pilot of the Swann gave one tap of the large bell, to indicate that he could not take the Ohio side of the channel, and almost simultaneously rang the bells for stopping and backing. The respondents also insist that, when the Fern's bell was heard, the Swann was in the proper place of an ascending boat of her size, at that stage of water, following the channel, and slightly quartering towards the Virginia shore; and that the Fern, being close to the Ohio shore, and with every facility for passing the Swann on that side, had no right to signal for the Virginia side; and that the Fern improperly attempted to cross the channel, and was nearly at right angles with it, when the boats came together. And they insist also, that having made the attempt to cross, she was wrong in stopping and backing; and that the collision was the result of this improper navigation, and not of any faulty conduct on the part of the Swann.

It may be noticed here, as one of the facts about which there is no contradiction in the evidence, that the Swann struck the Fern at an angle of about 72° with her stem; and that she sunk near the head of the bar, about one hundred yards from the Ohio shore: her stern being in deep water, and very near the line of navigation usually followed by both ascending and descending boats at that point.

This brief outline presents the nature of the controversy between these parties. Their theories and assumptions, both in the pleadings and by the evidence, are in direct conflict; and, it may be added, both cannot be sustained. The libelants claim that their boat was without fault, and, therefore, that the respondents are answerable for the whole damage she has suffered from the collision; while the respondents claim that the injury to the

The Fanny Fern and The Thomas Swann.

Fern was not occasioned by any fault on their part, but is chargeable solely to her mismanagement.

The evidence affords no ground for any unfavorable presumption against either of the parties, for any failure to comply with the requirements of the act of Congress of 1852. Whatever of contradiction there may be in the proofs in other respects, it satisfactorily appears that each of the boats was provided with the requisite signal lights, and that they were in good order at the time of the collision; and also that each was manned with the usual and necessary number of men and officers. And it is specially worthy of notice here, that the proof is ample, on both sides, to show that the pilot of each boat on duty at the time of the collision was, in all respects, trustworthy, and well qualified for the duties of his station.

With a view to some proper basis for a decree in this case, I have carefully read and reflected on the great mass of evidence presented on the hearing, partly oral, but mostly in the form of depositions. In this effort, I have encountered great difficulties, arising from the discrepant and contradictory character of the evidence, for and against the opposite claims of the parties. It is impossible, by any mental process, or upon any known principle of estimating the preponderance of evidence, to decide with even reasonable certainty, in what direction the scale should incline. With equally favorable opportunities of witnessing the occurrences to which they testify, and with the presumption that the witnesses on either side are equally intelligent, truthful and credible, it would seem to be an arbitrary exercise of the discretion of a judge, to reject the testimony given by one party and accredit that given by the other.

To show the difficulty, if not the utter impossibility, of sustaining the hypothesis of either of these parties, it is only necessary to state some of the essential features or aspects of the case, in regard to which the evidence is in direct and irreconcilable conflict. And first, it is a conceded fact in the case, that the signal bell of the Fern, the descending boat, was first sounded; but as to the relative position of the boats, when the bell was tapped, and when the pilot of the Swann was apprised that a boat was approaching, the testimony of the parties is essentially

162 DISTRICT COURT OF THE UNITED STATES.

The Fanny Fern and The Thomas Swann.

variant. The witnesses for the libelants testify that the Fern, at that point, was in the proper place of a down-going boat, some one hundred and thirty yards out from the Ohio shore, and nearly on a line with the inner side of the bar. On the other hand, the respondents' witnesses testify, that when the bell of the Fern was first tapped, she was so near to the Ohio shore, that her lights were blended with, and could not be distinguished from, lights along the shore; thus rendering it impossible for the pilot of the Swann to know that a boat was coming down, until her bell was heard; and also excluding the descending boat from the right of choosing the outer or Virginia side of the channel, and making it altogether wrong in her to cross the channel, for the purpose of getting on that side. And the evidence is not less conflicting, in reference to the position of the Swann, the ascending boat, at the point where she was first seen by the pilot of the Fern. On one side, the proof is, the Swann was coming up the Ohio shore; on the other, that she was out in the channel, quartering to the Virginia side. And as to the distance between the boats when the Fern was first seen by the pilot of the other boat, a point of vital importance in the decision of the case, the evidence is very discrepant. The pilot of the Fern swears the distance was near a half a mile, and other witnesses for the libelants state it as upwards of a quarter of a mile; while for the respondents it is proved it did not exceed two hundred and fifty yards, and in the opinion of one witness, was not more than one hundred and fifty yards. There is also a direct contradiction between the testimony of the parties as to the course of the two boats, and their position at the time they came together. The libelants' witnesses swear the Fern was running straight down the river, up to the time when the pilot tapped her bell, and was then turned slightly across towards the Virginia side; whereas the respondents' witnesses say she was running nearly square across the river, and was struck by the Swann almost at right angles. And there is the same conflict in reference to the position of the latter boat. The witnesses for the libelants prove that the Swann turned out from the Ohio shore and was pointed across the channel, towards the Virginia shore, when the collision took place. The witnesses on the other

The Fanny Fern and The Thomas Swann.

side say her course was not changed from the time the Fern was seen, and was but slightly inclined towards the Virginia shore. And again, while the witnesses on one side state positively that the Swann ran into the Fern, those on the other are equally clear that it was the Fern that struck the Swann.

These are some of the points in reference to which the evidence is conflicting, to an extent that makes it difficult to come to a conclusion for or against either of the parties. The libelants, as the result of this unfortunate collision, are the sole sufferers, no injury having been sustained by the other boat; and, as already stated, they claim indemnity for the whole amount of the injury they have sustained. They are entitled to a decree for this, only on making proof that the injury resulted from the fault of those having charge of the respondents' boat, and that there was no want of ordinary care or skill on the part of the libelants, to prevent the collision. On the other hand, it is a well settled principle of maritime law, that the fault of one boat or vessel will not excuse any want of care, diligence or skill in another. Now, if the court was at liberty to regard the evidence for the libelants, to the exclusion of that offered by the other party, there could be no hesitation in decreeing indemnity for the full amount of the injury. That evidence proves the respondents' boat to have been in fault, without any blame imputable to the libelants. But, if the evidence of the respondents is received and accredited without regard to that adduced by the libelants, the fault would rest upon the boat of the latter; and, the result would be a decree dismissing the libel, at the costs of the libelants. But for the reasons stated, I am unable satisfactorily to come to either of these conclusions, or enter a decree upon either of the grounds indicated.

Without thinking it necessary, in the view I take of this case, to enter minutely into the examination of the evidence presented on both sides, I am prepared to state, as the conclusion of my mind, that the collision in controversy was not the result of inevitable or unavoidable accident. This is defined to be, "that which a party charged with an offence could not possibly prevent, by the exercise of ordinary care, caution and maritime skill." 2 Dods. 83; 2 Wm. Rob. 205; Flanders on Mar. Law,

The Fanny Fern and The Thomas Swann.

298. It is not a reasonable supposition, that the injury sustained by the libelants' boat could have been inflicted, without some fault, and as the mere result of unavoidable necessity. There was, at the time of this occurrence, not less than twelve feet water in the channel of the river, and it was then rising. At the place where the Fern sunk, near the outer edge of the upper part of Grave Creek Bar, there was a depth of fourteen feet. There was deep water the whole width of the channel between the edge of the bar and the Ohio shore, which, at that stage of water, was from one hundred to one hundred and twenty yards wide; and even upon the bar itself there was six feet water. There was then ample room for these boats to have passed, without coming in contact. And moreover, there is no disagreement in the statements of the witnesses, that the night was calm, and although somewhat cloudy, not so dark as to render navigation difficult or dangerous. With these facts in view, there would seem to be no difficulty in reaching the conclusion, that there was a censurable want of care, caution or skill, in the management of these boats; and that the injury cannot be fairly placed to the account of inevitable accident.

It follows from this conclusion, that if this is a case warranting a decree of indemnity, it must be regarded either as one of mixed or mutual fault, or inscrutable fault. If it be a case belonging to the first of these classes, by the well settled principles of the maritime law—differing in this respect from the common law—the decree must be for an equal apportionment of the injury sustained, between the two boats, with such order in respect to costs, as the court may deem equitable. While I do not affirm that such a decree might not be justified in this case, there would seem to be an objection to such a disposition of it. As I understand the maritime law, the court not only must find, as a basis of such decree, that the blame is imputable to both parties, but must find specifically the faulty acts of each, to which the injury is to be charged. As already intimated, it may be well doubted, whether the most searching analysis of the evidence would result in a satisfactory conclusion as to the precise acts which were the direct cause of the collision. The contradictory character of the evidence involves the facts of this

case in great doubt, and renders it extremely difficult to attain such a result with reasonable certainty. Nearly every fact stated by the witnesses, imputing censure in the management of either of the boats, is so far impugned by opposing evidence, as to create doubt and uncertainty. In this state of the case, the court would scarcely be justified in assuming a theory, which could only be maintained by arbitrarily repudiating the evidence on one side, and accrediting that offered by the other. For the reasons which will be stated hereafter, there is no necessity for a resort to this desperate expedient, to attain the ends of justice in this case.

It is true, there is one exception to the remark just made, that nearly every material fact implicating either boat is contradicted by opposing testimony. It has not escaped the attention of the court, that the evidence shows conclusively, that the *Swann*, as the ascending boat, failed to give the first tap of the bell, as required under certain circumstances, by the rules of the board of supervising inspectors, adopted pursuant to the steamboat law of 1852. This act of Congress confers on this board ample authority to adopt such rules; and they are obligatory in cases to which they fairly apply. And a violation of any of these rules, resulting in disaster, raises a presumption of culpability, which can only be removed by proof that the collision is attributable to some other cause. The rule referred to requires the pilot of an ascending boat, "so soon as the other boat shall be in sight and hearing, to sound his bell," etc. But if, with ordinary diligence, the descending boat is not seen or heard in time to enable the pilot to comply with the rule, no censure can attach for not doing so. It would seem from the evidence of the respondents, that the *Fern*, from the fact that she was too near the Ohio shore, and from the impossibility of distinguishing her lights from those on the shore, was not seen and known to be a steamboat, until her bell was heard by the pilot of the *Swann*. This fact would excuse the pilot for not complying with the rule referred to. In reference to some other requirements contained in these rules, which have been noticed in the argument, I have only to say, that I doubt their application to the then state of the river, and the circumstances in which these

boats were placed, immediately preceding the collision. There was not only a wide channel between the Ohio shore and the bar, but in point of fact, there was water enough on the bar itself, for either of the boats to have passed over it. Without further remarks on this point, I have only to say, in reference to the rules referred to, that they must be construed in subordination to the paramount rule of navigation, that a collision must always be avoided if possible; and an injury inflicted will not be justified, unless inevitable, on the ground that the injured boat had violated a prescribed rule.

But I do not propose to enter into an elaborate inquiry, whether this is a case of mixed or mutual fault, justifying a decree on that basis. In my judgment, there are, as before intimated, obstacles in the way of entering such a decree in this case. And as it may be disposed of on another principle, according, as I think, with strict justice and the doctrines of the maritime law, I prefer to place it on that ground. In its results, so far as the interests of these parties are concerned, the decree which I propose to enter, for an equal apportionment of the loss sustained by the collision, is the same as if based on the finding of mixed fault.

As already intimated, I cannot, upon the evidence before me, with any reliable certainty, adopt the conclusion that the injury suffered by the libelants arose from the sole fault of those in charge of the respondents' boat; nor can I find the reverse of this proposition to be satisfactorily established, and thus hold that the respondents are absolved from all liability for the injury sustained. It is equally clear, for reasons before adverted to, that this injury cannot be fairly charged to inevitable accident. It is a fair deduction, from the facts before the court, that the cause of this collision is to be found in the faulty management of one or both of these boats. And I have no hesitation in concluding that, in the excitement produced by the occasion, the pilots of both were in fault. This is a reasonable implication from all the circumstances involved in the transaction. And yet, from the conflict in the evidence, as before remarked, it is difficult, if not impossible, to determine to what direct and specific acts the collision is to be attributed. And this, as I understand the

maritime law, makes it a case of damage or loss, arising from a cause that is inscrutable. It is not, of course, to be inferred from this, that any doubt exists that the immediate cause of the injury to the Fern, was the collision between the boats; but it implies that the causes which led to this result are involved in obscurity and doubt.

In this view it only remains to inquire what decree shall be made in this case. This is the only occasion on which this point has been before this court, and I confess, that from my limited experience in the administration of maritime law, I enter upon its consideration with some hesitancy, and with great reason to distrust the conclusion to which I might be led, unaided by the light which others have thrown upon the subject.

It is insisted by the counsel for the respondents, that the maritime law gives no redress for an injury resulting from the collision of boats or vessels, unless the court can find from the evidence that it was the result of the sole fault of one; or that it was mixed or mutual fault. This ground supposes that there can be no decree for an apportionment of the loss, if, for any reason, the cause of the injury is inscrutable, or left in such doubt that there can be no satisfactory finding of specific facts.

The English admiralty decisions referred to by counsel would seem to sustain this position. They certainly show, that where the cause of the injury is inscrutable, and the proof does not implicate either of the parties as in fault, there can be no decree for an apportionment of the loss. I do not think they establish it as the law in England, that where there is reason to conclude one or both parties were in fault, but the evidence leaves it uncertain which, that no decree can be rendered for a contribution by moieties. I do not, however, propose a critical examination of these cases, as I consider the question referred to as satisfactorily settled in this country.

In his commentaries on Bailments, §§ 609, 610, Judge STORY discusses this question, and maintains the right and expediency of dividing the loss, as between colliding vessels, where the fault is inscrutable. His language is: "Another case has been put by a learned commentator on commercial law. It is, where there has been some fault or neglect, but on which side the

blame lies is inscrutable, or is left by the evidence in a state of uncertainty. In such a case, many of the maritime states of continental Europe have adopted the rule to apportion the loss between the vessels." The writer referred to by Judge STORY is Mr. Bell, whose commentaries on the laws of Scotland have given him a distinguished reputation as a jurist. And in reference to the doctrine asserted by this author, Judge STORY remarks, that "if the question be still open for controversy, there is great cogency in the reasoning of Mr. Bell, in favor of adopting the rule of apportioning the loss between the parties. Many learned jurists have supported the justice and equity of such a rule; and it especially has the strong aid of Pothier, and Valin, and Emerigon." In a note appended to the section before cited, Judge STORY has inserted the argument of Mr. Bell in the maintenance of his views, the force and clearness of which certainly entitle it to the highest consideration.

I am not informed whether the doctrine, thus approvingly referred to by Judge STORY, has been distinctly asserted by him in any case calling for its judicial recognition. But another learned American judge, eminent for his profound research in the doctrines of the maritime law, and his able and judicious administration of that law, holds the rule for the apportionment of damages, in cases of an injury by collision, where the fault is uncertain or inscrutable, as indisputable, in the United States. In the case of the *Sciota*, reported in Davies' Reports, 359, Judge WARE, the learned judge of the United States for the district of Maine, says: "This rule in admiralty—a contribution by moieties—seems to prevail in three cases; first, where there has been no fault on either side; second, where there may have been fault, but it is uncertain on which side it lies; and third, where there has been fault on both sides." In the syllabus of this case, the point is stated thus:—"But if it—the collision—happens without fault in either party, or if there was fault, and it cannot be ascertained which vessel was in fault, or if both were in fault, then the damage and loss are divided between them, in equal shares."

I may be permitted to remark, though I have not seen the re-

The Fanny Fern and The Thomas Swann.

ported cases, that I am informed that since the decision in the case of the *Sciota*, before referred to, Judge WARE has asserted the same principle in other cases. To what extent other American judges have affirmed it, I have not the means of information. But having the high sanction of STORY and WARE—both known as able exponents of the maritime law—and sustained, too, by the most distinguished jurists of continental Europe, I have no hesitancy in applying it to the case before the court.

A late elementary writer on maritime law in this country, of high reputation for accuracy and learning, affirms, that "without question, the doctrine above stated is the American law on this subject." This writer says: "Where the collision is evidently the result of error, neglect, or want of precaution, which error, neglect, or want of precaution is not directly traceable to either party, but is inscrutable, or left by the evidence in a state of uncertainty, there the rule of the maritime law is, that the loss must be apportioned between the parties, in equal moieties." Flanders on Mar. Law, 296. This writer admits that a different rule prevails in England, but very justly remarks "that the rule adopted in England does not necessarily determine the law for us, in the United States. And accordingly, we find that the courts of admiralty in this country adhere to the rule of the ancient maritime law." Ibid, 298.

Adopting this view of the law, and satisfied that the application of the principle adverted to meets the real equity of the case, I shall decree an equal apportionment of the loss between the parties. As already stated, the contradictory and irreconcilable character of the evidence leaves the mind in doubt and uncertainty, as to some of the important facts in the case; but there is a satisfactory ground for the conclusion that both the colliding boats were in fault, and therefore that each shall contribute to the loss. And I may remark here, that in my judgment, the enforcement of the principle here sanctioned, is not only vindicated as in itself just and equitable, but in its application to the navigation of the western waters, as altogether expedient. Heretofore, in cases of collision, the great object of each party has been to prove his adversary exclusively in the wrong, and thereby avoid all pecuniary liability. And it is almost proverbially true, that

170 DISTRICT COURT OF THE UNITED STATES.

The Fanny Fern and The Thomas Swann.

in collision cases, each party has but little difficulty in sustaining, by the proofs, any state of facts which may be insisted on. In most cases, the witnesses on either side, from a misapprehension of the facts, or a dishonest purpose of representing them falsely, involve the transaction in such doubt and uncertainty as to render it impossible to reach a satisfactory conclusion. If, under such circumstances, a reasonable ground is furnished for the conclusion that there is fault on both sides, and that each party should share in the loss sustained, there would be greater caution and vigilance in navigation, and less effort and less temptation, by corrupt or unfair means, to misrepresent or distort facts.

It appears satisfactorily, that the injury resulting from the collision fell almost exclusively on the Fern. The injury to the Swann is so slight that the respondents have set up no claim to remuneration. The result, therefore, of the decree will be, that one-half of the actual loss or injury sustained by the Fern, must be paid by the respondents. The value of the Fern is variously estimated by the witnesses who have testified on that subject, at sums raging from \$12,000 to \$20,000. For the purposes of this decree, the court fix her value at \$15,500. There is proof in the case, that the Fern has been raised, but no evidence was offered of her value, including her engine and machinery, after the collision. This value, whatever it may be, will be deducted from the sum of \$15,500, and the respondents are decreed to pay the libelants one-half of the balance. It will be necessary to appoint a commissioner to inquire into and report the value of the Fern after the injury. This will be provided for in the decree to be entered. In reference to the costs, under the circumstances of the case, no discrimination will be made between the parties, and they will therefore be paid equally.

JAS. M. BROADWELL, Master of STEAMBOAT PRINCESS v. J. C.
BUTLER & Co.

JAS. M. BROADWELL, Master of STEAMBOAT PRINCESS v. KEYS,
MALTBY & Co.

District Court of the United States. District of Ohio. In Admiralty.

HON. H. H. LEAVITT, JUDGE.

1. It is part of the obligation of a common carrier to deliver the property placed in his charge within a reasonable time, but what is a reasonable time, depends upon the circumstances of the case.
2. The words "privilege of reshipping," in a bill of lading, are intended for the benefit of the carrier, but do not limit his responsibility.
3. If he undertakes to deliver goods within a specified time, he is liable for any delay beyond that time, unless the cause of the delay is within the exception in the bill of lading, or occasioned by the act of God, or the public enemy.
4. The subsidence of the water in the Ohio river, preventing a boat from passing up the falls with its cargo, is not strictly within any of the reasons which excuse a carrier for the failure to deliver goods within a reasonable time.
5. But proof of a usage long established, uniform and well known, to the effect, that under a bill of lading in the usual form, with the words "privilege of reshipping," inserted, a boat from below bound to any place above the falls, may wait there for a rise of water for a month or more without incurring liability for not delivering the cargo, in a reasonable time, is admissible.
6. The proof in this case is conclusive of the existence of such usage; and, therefore, the detention of the boat with its cargo, for thirty days or upwards, does not deprive the owner of a right to recover full freight to the place of consignment, if the property was delivered with promptness, after the first rise in the river.

Lincoln, Warnock & Smith, for libellant.

Coffin & Groesbeck, for respondents.

LEAVITT, J.—As the questions in these cases arise on nearly the same facts, and depend on the same principles, they will be considered together. They are suits in admiralty, brought by the libellant as master, for the owners of the steamboat Princess No. 3, to recover freight alleged to be due for the transportation,

172 DISTRICT COURT OF THE UNITED STATES.

Broadwell v. Butler & Co.—Same v. Keys, Maltby & Co.

in the first-named case, of a large quantity of molasses, and in the other, of sugar, from New Orleans to Cincinnati.

The facts necessary to be noticed, in the decision of the points presented, are: that on the 19th of February, 1853, the agents of the said Butler & Co., shipped on the Princess No. 3, at New Orleans, four hundred barrels of molasses, and the agents of Keys, Maltby & Co., at the same time and place, shipped on said boat, one hundred and eighty-nine hogsheads of sugar, consigned to those houses respectively, at Cincinnati. Bills of lading were signed by the libellant, in both cases, as master, in the usual form, undertaking for the delivery of said property to the consignees, at Cincinnati; the dangers of the navigation and of fire only excepted, at a rate of compensation stated in the bills. To both the bills of lading were attached the words, "privilege of re-shipping."

Within a day or two after the date of the bills of lading, the boat proceeded up the river, and arrived at the foot of the falls of the Ohio river, without accident or detention, on the 5th of March. It is admitted by the answers of the respondents, that their agents, at the time of the shipments, were apprised of the fact that, from the size of the steamboat, it could not pass through the locks of the canal around the falls, and consequently, that the cargo could not reach its destination, on that boat, in any other way than by passing over the falls. It is also an admitted fact, that on the arrival of the boat at the falls, the river had fallen so low, that there was not depth of water sufficient to permit its passage over them, and that it continued in that stage for about one month. At the expiration of that time, there was a swell in the river, which enabled the boat to proceed up; and, on the 10th of April, it arrived at Cincinnati, and the cargo was delivered to the consignees.

It is satisfactorily proved, that the time usually occupied in making the trip from New Orleans to Cincinnati, in favorable weather, and no accident occurring, is from ten to twelve days. There was therefore a detention of the boat, at the falls, of upwards of thirty days. It is clearly established by the evidence in these cases, that during the period of the detention of the boat, there was a decline in the price of molasses, at Cincinnati, of

from two to five cents the gallon, and in sugar, from one-eighth to three-eighths of a cent in the pound. The respondents respectively allege, that they are entitled to a set-off against the claim for freight, equal to the decline in the market value of the articles shipped, occurring while the boat was delayed at the falls. And this is the principal question arising in these cases.

The respondents insist, that the libellant failed to deliver the property shipped, according to the obligation of the bills of lading, and that the owners of the boat are, therefore, liable for any loss sustained by reason of such failure. They insist, that by the terms of the bills of lading, the carrier was bound to deliver the cargo, with all practicable diligence, and that if, by reason of low water at the falls, the boat could not pass up, he was bound to reship, or by some other means insure the prompt delivery of the property to the consignees.

On the other hand, the libellant contends, that the molasses and sugar were shipped by the agents of the respondents, with a knowledge that the falls of the Ohio might present an obstruction to the upward passage of the boat, and that his contract, by a fair construction of the bills of lading, was to deliver the cargo, with reasonable diligence, in contemplation of such obstruction; and that proceeding to Cincinnati with promptness and diligence, as soon as the state of the river would permit, and safely delivering the cargo there, was a full discharge of his contract as contained in the bills of lading. The libellant also insists, that the words, "privilege of reshipping," inserted in the bills of lading, instead of creating an obligation to reship at the falls, in case of low water, are to be construed as a privilege, enuring to his benefit, and designed to secure the right, should the interests of the owners of the boat require it, to reship the cargo at the falls, or at any other point.

I am not aware of any judicial decision, settling the legal import and construction of the words, with reference to a state of facts similar to those presented in these cases. The phrase "privilege of reshipping," is one in common use, in carrying on the commerce of the western waters; and questions have been of frequent occurrence, in suits against carriers to recover for the loss of, or injury to property, where there has been a reship-

ment under the right secured by these words in the bill of lading. But I know of none—nor have any been referred to—determining their effect, in a case asserting a loss, from a failure to deliver within a reasonable time. In the cases referred to, involving liability for loss or damage, it is well settled, that the privilege of reshipping in a bill of lading, is intended for the benefit of the carrier, but does not limit his responsibility. He is bound for the safe delivery of the property committed to him, precisely as if such words were not used in the bill of lading. The stringency with which the law holds him to this liability is well known, and need not be here stated.

That it is a part of the obligation assumed by a carrier of goods for hire, to deliver them within a reasonable time, is not controvertible. But what shall constitute a reasonable time, depends on the peculiar circumstances of the case. Parsons on Con. 657; Flanders on Shipping, 312. And this is the principle which must govern, in giving a construction to these bills of lading. No time is stated in them, within which the carrier obligated himself to deliver the goods. If such a stipulation had been a part of the contract, there would have been a liability for any delay beyond that time, unless it was occasioned by the act of God, or the public enemy; or was owing to the usual perils of navigation or fire, which are expressly excepted in the bills of lading. In strictness, the subsidence of the water in the Ohio river, which prevented the boat from passing over the falls, was not a cause of delay, which within any of these principles would excuse the carrier from the obligation imposed by law, to deliver the property within a reasonable time. It was practicable to have delivered the cargo at Cincinnati, by draying the molasses and sugar around the falls, and reshipping on other boats. But this would have been attended with very considerable expense to the carrier, and some loss and injury to the cargo. Was the carrier bound to incur this expense, and was he justified in detaining the property at the falls, awaiting a rise in the river?

Apart from all extrinsic facts, there would seem to have been an obligation on the carrier to avail himself of all the means within his power, to forward the sugar and molasses to the con-

signees, in the fulfillment of his undertaking, according to the legal import of the bills of lading, to deliver them within a reasonable time. But it is insisted, that the uniform usage among those connected with the commerce of the Ohio and Mississippi rivers, either as shippers or carriers, sanctions a different construction; and that, in conformity with that usage, the libellant in these cases was justified in waiting at the falls, till there should be a stage of water that would enable the boat to pass up.

That evidence of such usage is admissible, seems clear upon the authorities applicable to the subject. It is well settled, that a written contract cannot be varied, controlled, or contradicted by parol proof. But in the case of *The Reeside*, 8 Sumner, 567, Judge STORY said: "The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications or presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses," etc.

In the case of *Wayne v. Steamboat Pike*, 16 Ohio Rep. 421, it was held, that where terms used in a bill of lading, have by usage acquired a particular signification, the parties will be presumed to have used them in that sense; but usage will not be permitted to control the terms used, unless it is established by clear and satisfactory proof; other decisions to the same effect have been made, to which it is not deemed necessary specially to refer. At this day, there can be no doubt, that proof of usage is admissible in explanation of the intention of the parties, if that intention is doubtful or equivocal. And when clearly proved, it will be regarded as in the contemplation of the parties, at the time the instrument was executed, and as virtually embodied in it. In the first volume of *Parsonson Contracts*, 661, it is said, that "usage so long established, so uniform, and so well known, that it may be supposed the parties to the contract knew it, and referred to it, becomes, as it were, a part of the contract, and may modify in an important manner the rights and duties of the parties."

The evidence of a usage fixing the meaning and construction of the words "privilege of reshipping," fully meets the requirement of these authorities. A number of witnesses, of high standing and intelligence, and great experience, in the commerce and business of the west, embracing both shippers and carriers, say, that this phrase has been known to them for many years; and that when used in shipments from below, to any point above the falls of the Ohio, it is intended for the benefit of the carrier; leaving it to his choice to reship or not, as he may deem most for his interest; but it is never understood as creating an obligation to reship. These witnesses say, in reference to the obstruction at the falls of the Ohio, the words not only do not import the duty of reshipping, but that in case of inability to pass the falls from low water, the carrier incurs no liability for the detention, though it should be for an entire season. And several of the witnesses testify, that in all cases where it is intended to impose the obligation to reship, the words, "to be reshipped," are uniformly used.

The proof therefore of a well known and established usage, in the particular referred to, is full and satisfactory. It results, that the libellant has not violated his contract by detaining his cargo at the falls for the period of something more than thirty days, and is therefore entitled to a decree for full freight to Cincinnati, according to the rates specified in the bills of lading, with interest thereon from the time it accrued.

STEPHEN DUDLEY *et al.* v. THE STEAMBOAT SUPERIOR.

JAMES M. SEXTON *et al.* v. THE STEAMBOAT TROY.

District Court of the United States. District of Ohio. In Admiralty.

HON. H. H. LEAVITT, JUDGE.

1. In a controversy, in which the question is, whether a steamboat was a foreign or domestic boat, at the time the account accrued, for which the libel is filed, the

The Steamboat Superior.—The Steamboat Troy.

enrollment, made under oath by the managing owner, pursuant to the third section of the act of Congress, of the 31st December, 1792, requiring the enrollment to be made at the port nearest the residence of the owner, is *prima facie* evidence that the boat belonged to such port.

2. The proof afforded by the enrollment, in such a controversy, will be held conclusive as to the character of the boat, unless contradicted by clear evidence of the notorious residence of the owner, or owners, at a place or port other than that named in the enrollment.
3. When the owners of a boat reside at different ports, the vessel is to be considered a domestic vessel at the port where she is enrolled.
4. The presumption of the knowledge that a boat belongs to the port of its enrollment, as to those who furnish supplies or materials at that port, is strengthened by the fact that it bears on its stern, in conspicuous letters, as required by the act of Congress, the registered name of such boat, with the port to which it belongs, especially when the evidence is, that such boat made several trips weekly, to and from such port.
5. As to those claiming liens on a boat, as for supplies and materials furnished under the circumstances above stated, proof that they gave credit to the boat, as of a port of another state, will not avail, unless they have used ordinary diligence to ascertain its true character, or fraudulent or unfair means have been used to mislead and deceive them, as to the place to which it belongs.
6. Where a boat has been sold under an order of the Court of Admiralty, and the proceeds paid into the registry, and the fund is insufficient to pay all the claims against it; on a question of distribution, the claimants will be paid according to their priorities of privilege. In this case: 1. Claims of seamen for wages; 2. Material men having a lien by the general maritime law; 3. Material men having a lien by virtue of a seizure under a state law, without reference to priority of seizure.
7. A claimant, having an original admiralty lien, who has proceeded under a state law, in a state court, to enforce it, will be deemed to have waived such original lien, and must rely solely on the lien acquired by the seizure under the state law. He cannot resume it at pleasure, and thus be reinstated to his original rights.
8. For supplies furnished, or repairs made to a boat belonging to another state, there is an undoubted admiralty lien, equivalent to an hypothecation of the boat; but for repairs and supplies at the home port, there is no lien, unless given by the state law.
9. It is competent for a state to provide such a lien, and the national admiralty courts will execute a state law for such a purpose; but state legislation cannot supersede or destroy a lien acquired by the general maritime law.
10. A master of a boat or vessel has no lien for his wages as such.

John Ganson & D. O. Morton, for libelants.

Passett & Kent and *Willey & Cary*, for respondents.

LEAVITT, J.—The question before the court in these cases
VOL. I.

178 DISTRICT COURT OF THE UNITED STATES.

The Steamboat Superior.—The Steamboat Troy.

being substantially the same, it is not deemed necessary to give them a separate consideration. The principles to be settled apply alike to both, and will be carried out in the decrees to be entered, although the facts of each case are not wholly identical.

In the first-named case, the libelants filed their libel in this court on the 28th of October, 1853, claiming a balance of \$1,375.97, for supplies and materials furnished at the port of Buffalo, in the state of New York, averring that the Superior, during the period included in the account, was running between ports and places on the shores of lake Erie, lying in different states, and that she belonged to a port in Ohio. Many intervening claims—upwards of forty in number, and amounting, in the aggregate to \$22,654.23, have been filed under the original libel, consisting of claims for seamen's wages, repairs, supplies and materials, and one by mortgage. The interveners are residents of either Ohio, or New York, with the exception of one residing in Erie, in the state of Pennsylvania. Under the original libel in the case of the Troy, there are some forty interveners, all residents of Ohio and New York, whose claims amount in the whole to \$17,728.11, and embrace the same classes and descriptions as those against the Superior.

Without detaining to notice the previous proceedings and orders in these cases, it will be sufficient here to state, that at the April term, 1854, of this court, by the consent of all the parties in interest, an interlocutory order was entered for the sale of these boats, and directing that the proceeds should be paid into the registry, subject to the future order of this court, for their apportionment and distribution. At the succeeding October term, the marshal returned, that the Superior had been sold for \$5,700, and the Troy for \$6,610; the amount in each case being altogether insufficient to satisfy the claims exhibited respectively against them.

From the number and diversified character of the claims presented, and the complicated questions of priority likely to arise in the distribution of the proceeds, at the October term, A. D. 1854, upon the application of the parties, the cases were referred to H. B. Carrington, Esq., as a special commissioner to inquire into and report upon the character of the various claims exhib-

The Steamboat Superior.—The Steamboat Troy.

ited and the order of their priority. The commissioner, in the discharge of his duties, at the late term of this court, submitted a full and elaborate report on the various matters referred to him, which from its fullness and general accuracy, has greatly aided in the right understanding of the claims and interests of the contending parties.

The questions now before the court for its decision, arise on exceptions to the findings and conclusions of the commissioner.

The first inquiry presented, and one which most materially affects the standing and interest of these parties, in a court of admiralty, relates to the port or place to which these boats belonged, during the periods embraced in the accounts now presented as maritime claims. The commissioner has reported, as his conclusion, from the evidence before him, that from the autumn of 1852 till the 5th of June, 1853, they belonged to Buffalo, in the state of New York, and that from the last-named dates they were Ohio boats. As the result of this finding, the claimants residing at Buffalo, whose accounts run from the fall of 1852 till the 5th of June following, would be domestic creditors, and as such, would have no maritime lien on the boats, other than that given by the local laws of New York and Ohio. On the other hand the creditors resident in Ohio, whose accounts run during the time stated, would be foreign creditors, and as such, have a lien under the general maritime law.

The facts on which the commissioner bases his conclusions, as to the character of these boats may be briefly stated as follows: The Superior was purchased by William H. Forsythe, at Buffalo, in the fall of 1852, and was fitted out and equipped at that place under his immediate superintendence, during the winter and early part of the spring following.

It was enrolled at Buffalo, as of that port, on the 5th of March, 1853, and subsequently, on the 2d of May following, as of the same place. These enrollments were made by Forsythe, the principal owner, under oath, in accordance with the third section of the act of Congress of the 31st of December, 1792, which requires among other things, that the enrollment shall be made at the port nearest the residence of the owner. Forsythe, at the time of the enrollments, had the sole management of the boat; his

The Steamboat Superior.—The Steamboat Troy.

co-proprietor residing at Cleveland, in the state of Ohio. After it was equipped and enrolled, as required by the act of Congress referred to, the name was put on its stern, as follows: "Superior, of Buffalo." Early in June, 1853, it ceased to run to Buffalo, and from that time was employed in running from Cleveland and Toledo in Ohio.

The Troy was also enrolled at Buffalo, the 26th of October, 1852, as of that port, upon the oath of Forsythe, as the managing owner, having at the time an interest of three-fourths in the boat; the other fourth being owned by a resident of Buffalo. Upon the stern the words, "Troy, of Buffalo," were conspicuously painted.

It had been previously enrolled as of Toledo, Ohio; changes in the enrollment having been made after the purchase by Forsythe and his co-owners. In October, 1853, both the boats were mortgaged by Forsythe, and the mortgage was recorded at Buffalo.

In addition to the foregoing facts, bearing directly on the question of the character of these boats during the period referred to, the depositions of several witnesses were taken, in relation to the residence of Forsythe, the principal and managing owner of the boats. From these depositions, it appears, that Forsythe at the time was an unmarried man, of somewhat irregular habits; and although his parents resided in Ohio, he seems not to have had any fixed or notorious residence. It is not strange, therefore, that there should be some conflict in the evidence, touching his residence. I do not propose to analyze this evidence with a view to show in what direction the scale preponderates. It is sufficient to state, that in so far as Forsythe may be deemed to have had any place of residence during the period in question, the weight of the evidence sustains the conclusions of the commissioner, that it was at Buffalo. It is true the oral testimony of Forsythe on the hearing, if accredited, would lead to a different result; but, for reasons not necessary to be stated, but which will be obvious to those acquainted with the facts, the court cannot do otherwise, than to view his statements as wholly unreliable.

Under the circumstances of this case, it is clear the enrollments of these boats are *prima facie* evidence, that they belonged to the

port of Buffalo at the time of their registry. It is true, in controversies between the owners of a vessel, involving a question of title merely, the enrollment is not even *prima facie* evidence. When offered to show title or proprietorship in the person making it, it is wholly inadmissible as evidence, for the reason that it is proof only of his acts, and cannot be received against other parties. But, upon an incidental question, not affecting the title of the parties, it is competent evidence; and unless contradicted by clear evidence, will be held conclusive as to the port or place to which the vessel belongs. Evidence of the notorious residence of the owner, at a place different from that stated in the enrollment is doubtless admissible, and may be available in contradiction of the enrollment. But, in this case, there is no proof for which this effect can be fairly claimed.

In the case of *Tree v. The Indiana*, Crabbe's R. 479, the enrollment seems to have been regarded as conclusive evidence of the port to which the vessel belonged. The facts were briefly these: The vessel was built and owned in New Jersey, and was enrolled by the owners at Egg Harbor, in that state, as of that port. Subsequently, a citizen of Philadelphia purchased a part of the vessel, and, on this change of ownership, it was enrolled at that place and as of that port; the other owner still residing in New Jersey. It was insisted that it belonged to that state; but the court held, that from the date of the enrollment at Philadelphia, the vessel was of that port, and not of the port in New Jersey, where a majority of the owners resided.

It is urged, however, that the creditors of these boats, residing at Buffalo, aided in the repairs, and furnished supplies and materials, under the belief that they were foreign and not domestic boats, and that they are to be regarded, in a controversy touching their interests as creditors, as having the character which they supposed them to possess. This is doubtless the true doctrine, if fraud or unfair means have been used to lull the vigilance of the party giving the credit, or mislead or deceive him, in respect to the real character of the boat or vessel. There is, however, no evidence in this case, that any such means were resorted to. It is true a card purporting to have been issued by Forsythe and another person, announcing that they had commenced the for-

warding and commission business at Cleveland, in the state of Ohio, has been offered in evidence. It is not material to decide whether this can be received as evidence, unaccompanied with proof bringing home the knowledge of such business arrangements to the persons giving the credit at Buffalo. There is no proof of this character offered, and no ground therefore for the inference or presumption, that the card referred to could have misled them in reference to the character of the boats as foreign or domestic. The enrollments of the boats were of record in the custom-house at Buffalo; and slight diligence would have enabled those interested to know to what port or place they belonged. Besides, these boats during that part of the season of navigation in which they were engaged in the Buffalo trade, arrived at, and departed from that port, several times every week, bearing on their sterns the significant announcement, and giving to all a standing notification that they belonged there.

The evidence, therefore, clearly warrants the conclusion that these boats did, in legal estimation, belong to Buffalo up to the 5th of June, 1858, when it was notorious they were wholly withdrawn from that trade, and were thenceforth, during that season, employed between ports and places within the state of Ohio. As a consequence, those who aided in repairs, or furnished supplies and materials at Buffalo, prior to the 5th of June, can be viewed, under the circumstances, in no other light than as domestic creditors, and as such, have no other lien, other than that given by the statutes of New York and Ohio. Subsequent to that date, they occupy the position of creditors of foreign boats, and their rights as such will be recognized and enforced. And, as a further result, the Ohio claimants, whose accounts date from the time of the enrollments of these boats to the 5th of June, 1858, occupy the standing of creditors of foreign boats, and as such, have a clear admiralty lien, which will be enforced as to those who have not waived such lien by resorting to the local law of Ohio for the recovery of their claims. From the report of the commissioner, it appears that many of the Ohio creditors who, in accordance with the conclusion just stated, had a clear maritime lien on the boats, independent of that given by the local law, have proceeded to obtain seizures of the boats under

that law, and by process from the state courts. They have included in their claims, not only materials, supplies, etc., furnished those boats, while they were, to them, boats of a home port, but also such as were furnished while they were of a foreign port. I have found no reported case settling decisively the effects on the right of a party having an admitted admiralty lien, who voluntarily waives that lien, and resorts to the local law for his indemnity and protection. There can be no question of his right to do so; but I suppose, in analogy to the doctrine of waiver, as applicable to other cases, that the party thus abandoning his maritime lien, as before stated, cannot resume it at pleasure, and thereby be reinstated in his original rights. Without knowing how or to what extent this principle may affect the interests of the numerous claimants in these cases, I am inclined to sustain it; and the decree to be entered will be framed accordingly.

In this posture of these cases, the important question arises, on what principle is the distribution of the proceeds in the registry to be made? Concerning the claims for seamen's wages, there is no controversy. It is conceded they must be first paid out of the funds on hand. The next class in the priority of privilege are the material men. As before stated, some of these are residents of Ohio, some of New York, and one of Pennsylvania. Some claim as the creditors of a foreign boat, and rely on their general admiralty lien; and some claim under liens acquired by virtue of the laws of Ohio. The proceeds in the registry, it appears, will not pay more than fifty per cent. of the claims reported by the commissioner as constituting liens on the boat. After paying seamen's wages, the commissioner has adopted the conclusion that the material men, whether having original admiralty liens, or liens acquired by seizure under the statute of Ohio, occupy the same rank of privileges, and must be paid *pro rata*, so far as the proceeds will reach. And this view is concurred in by the proctors representing a large number of the claimants.

The question here indicated is certainly one of great interest, and I regret to say, I am aware of no authorities bearing directly on it. In some of its aspects, as applicable to the present case,

the *pro rata* rule of distribution insisted on seems just and equitable; and I would cheerfully adopt it, if it did not conflict with what I suppose to be the settled doctrines of the maritime law. I am not prepared for, and therefore shall not attempt an extended discussion of the principles involved in the inquiry before stated. I shall content myself with a very brief statement of some of the reasons which occur to me against placing all the material men who are claimants in this case on a footing of equality, and applying to all the *pro rata* rule of distribution. It is obvious to me that there is a clear distinction between those claimants for repairs made, or supplies and materials furnished to these boats, as boats of a foreign port or state, for which a lien or privilege attaches by virtue of the general maritime law, and those which exist only by seizure under the local law of a state. The former have their origin in the fact, or the presumption of the fact, that the credit is given, not to the owner or master, but to the vessel; and by the admitted doctrine of the maritime law, it attaches from the time the credit is given, and is equivalent to an express hypothecation of the vessel. It adheres to the *res* as a subsisting and efficient lien, wherever it goes, and into whosoever hands it may pass. Not so, however, in regard to credits given in a home port. These are supposed to be on the credit of the master or owner, and do not import a lien on the vessel, unless provided by express legislation of the state in which the credit is given, and on grounds unknown to the general maritime law. The right of a state thus to legislate has long since been conceded by the highest courts of the Union; and it is equally well settled, that when such a lien is created by a state law, it may be enforced in the admiralty courts. But I am not aware that it has been anywhere admitted that state legislation can interfere with, supersede or destroy a right or lien previously acquired under the national maritime law. On the contrary, the existence of such a power in the states has been strongly denied. They may declare that a lien shall exist in cases designated, and provide for its enforcement by a seizure *in rem*; but, clearly, the lien so acquired must be subordinate to those existing before, in favor of other parties.

The Steamboat Superior.—The Steamboat Troy.

Under the water craft law of Ohio, there is no lien, till after the seizure of the thing. To hold that this lien places the attaching creditor on a footing of equality with one who has an admitted maritime lien on the same vessel, would be virtually to set aside the claim of the latter, and wholly to defeat his right. Such, at least, in cases like the present, where the proceeds of sale are not sufficient to pay all the claims against the vessel, would be its virtual effect. I cannot suppose that such a result was intended by the Ohio statute; but if admitting of such a construction, it implies the exercise of a power by the legislature, in conflict with the constitution and laws of the United States.

But, without pursuing this subject further, I will state, as the result of my reflections on the question stated, that in determining the mode of distribution of the funds in the registry, there must be a discrimination in favor of those claimants who have a subsisting maritime lien, and those who subsequently acquired liens by seizure under a state law. There is certainly a fallacy in the argument by which the conclusion is reached, that because those having these statutory liens, are material men, they are to have the same priorities of privilege as those who have previous maritime liens. The origin and nature of these liens, must be regarded in fixing on a rule by which distribution of the proceeds shall be made. Such I understand to be the rule sanctioned by the learned judge of the District Court of Maine, in the case of the *Paragon*, Ware's Reports, 322. He says, "Where all the debts hold the same rank of privilege, if the property is not sufficient fully to pay all, the rule is, that the creditors shall be paid concurrently, each in the proportion to the amount of his demand. But, when the debts stand in different ranks of privilege, then the creditors who occupy the first rank, shall be fully paid, before any allowance to those who occupy an inferior grade."

Being as I think, warranted in the conclusion, "that the class of claimants, in whose favor there existed a present valid maritime lien, are entitled to a priority in the disposition of the funds in the registry, I shall decree, that such be first paid, without reference, as between them, to the order of time in which

The Steamboat Superior.—The Steamboat Troy.

their claims respectively accrued. After excluding those claimants who have abandoned their maritime liens, by resorting to seizure under a state process, there will be but a small number, occupying the first rank of privilege, among the material men. It appears, however, from the analysis of the claims submitted by the commissioner, that there are some of this description. These will be ascertained by reference to the report; and full payment will be decreed to them, so far as they have admiralty liens. The claim of George F. Morton, of Erie, Pennsylvania, the boats being foreign to him, will be included in the class of privileged claims to be first paid. The claims for seamen's wages, and the preferred class of material men being provided for in the decree, those who have acquired liens by seizure under the laws of Ohio, will constitute the next class. These will be paid *pro rata*, from the funds remaining, without reference to the order of time in which the seizures were made.

It is proper to notice that the claim of James M. Sexton, the original libellant in the case of the Troy, embraces an account for wages, as master of the boat, and also as mate. It is clear, that upon no principle has the master a lien on the vessel for his wages. This part of the claim is therefore rejected, and the decree will embrace only the amount due him for wages as mate.

These are the only material points presented on the exceptions to the report of the commissioner.

A decree in each of the cases will be entered in accordance with the principles before stated.

The libels filed by interveners having neither an admiralty lien or a lien by seizure under the Ohio statute, are dismissed at the costs of the libellants.

NORTHERN DISTRICT OF OHIO.

DECISIONS

OF THE

HON. H. V. WILLSON, JUDGE.

LEMUEL WICK *v.* THE SCHOONER SAMUEL STRONG.

*District Court of the United States. Northern District of Ohio.
In Admiralty.*

HON. H. V. WILLSON, JUDGE.

1. A question of jurisdiction being a preliminary inquiry, it is proper that it should be brought to the consideration of the court at the earliest opportunity.
2. The district courts of the United States have a general admiralty jurisdiction *in rem*, in suits brought by material men against foreign ships; and in cases of domestic ships where the local law gives a lien.
3. The act of the legislature of Ohio entitled, "An act providing for the collection of claims against steamboats and other water crafts and authorizing proceedings against them by name," passed February 26th, 1840, and the act explanatory thereof, passed February 24th, 1848, does not create a lien; it only affords a remedy. These statutes being in derogation of the common law, should be construed strictly.
4. Where a state statute has received a construction by the supreme state courts, that construction is binding upon the federal courts.
5. The Supreme Court of the state of Ohio have decided that their water craft law does not create a lien. See 14 Ohio, 410.

Keith & Coon, for libelants.

Otis & Sears, for respondents.

The schooner Samuel Strong was built at the mouth of Black river, Lorain county, in this state, in the summer of 1847, by

The Samuel Strong.

citizens of that county. In the course of her construction she contracted a large debt to the libelant, then and still a resident of Cleveland. She was originally enrolled at the port of Cleveland, and was run by the parties who built her until in or about the month of July, 1848, when her then owners sold one-half of her to parties in Wisconsin, and her registry was changed from the port of Cleveland to the port of Chicago. On the 18th of June, 1855, the schooner, then lying in the port of Cleveland, was attached by the libelant. The present claimants, who allege themselves to be *bona fide* purchasers and sole owners of the schooner, filed their claim and also their answer, which, among other grounds of defence, excepted to the jurisdiction of the court over the schooner, upon the ground that the statute of this state known as the "Common Carrier Act" (Swan, 185), did not create a lien but conferred a remedy merely. In order to save costs, it was agreed by the counsel that the motion to dismiss the libel should be heard before any steps were taken to substantiate the libelant's claim, or the other grounds of defence.

WILLSON, J.—The libel in this case was filed on the 18th of June, 1855. It seeks to enforce a lien for materials furnished by the libelant, from May to October inclusive, in the year 1847, in the building of said schooner at Black river, in the district of Ohio. The libelant is now, and was in the year 1847, a resident of the city of Cleveland; and in the third article of this libel, he avers among other things, that by the maritime law, and the law of Ohio, a lien is given him in the premises, which he can enforce and by which he can obtain redress in admiralty.

To the libel a defence is interposed by Walker, Bean & Alvord, claimants, and residents of the state of Wisconsin, who have duly filed their claim, answer and exceptions. The defence made by the pleadings consists of,

1st. The statute of limitation, in bar of recovery after the lapse of six years from October, 1847.

2d. A judicial sale of the schooner Samuel Strong, by virtue of a decree in admiralty, rendered by the United States District

Court for Wisconsin, on the 19th of May, 1851, in a causa civil and maritime.

3d. That this court has not jurisdiction of the subject matter of this suit.

I have not thought it necessary to examine all the questions which arise out of this record, because from the view I have taken of it, the decision of the cause must turn upon the single question of the jurisdiction of the court, and as the question of jurisdiction is in its nature a preliminary inquiry, it is certainly proper, in whatever form it may be presented, that it should be brought to the consideration of the court at the earliest opportunity, and be decided before incurring expenses which would be rendered fruitless by the dismissal of the cause for want of jurisdiction.

It is claimed by the counsel for the libellant in this case, that a maritime lien and a proceeding *in rem* are correlative, and that wherever a proceeding *in rem* is competent, a lien exists, and *vice versa*.

This is true beyond a question, when a proceeding *in rem* in the admiralty court for wages, salvage, collision or bottomry, goes against the ship in the first instance. But this rule does not obtain in the case of a domestic vessel for materials furnished, and when the question of lien depends upon the local statute. This is evident from the language of the 12th rule in admiralty prescribed by the Supreme Court of the United States. This rule provides that "in all suits by material men for supplies or repairs, or other necessities, for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceedings *in rem* shall apply to cases of domestic ships, when, by the local law, a lien is given to material men for supplies, repairs or other necessities."

It may, therefore, be laid down as a well established principle of maritime law, fully recognized by the federal judiciary, that the district courts have a general admiralty jurisdiction *in rem*, in suits, by material men, in cases of foreign ships, or ships of another state; and that in cases of domestic ships no lien is implied, unless the local law gives a lien; in which event it may be

The Samuel Strong.

enforced in the District Court. In the case of the *General Smith*, 4 Wheaton, the court decided with great clearness that, "when the proceeding is *in rem* to enforce a specific lien, it is incumbent upon those who seek the aid of the court, to establish the existence of such lien in the particular case. When repairs have been made or necessities have been furnished to a foreign ship, or to a ship in a port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for security, and he may well maintain a suit *in rem* in admiralty to enforce his right. But in respect to repairs or necessities in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state, and no lien is implied unless it is recognized by that law."

The case before us is one where the materials were furnished to a home vessel in her home port, and the question for the court to determine is, whether the law of Ohio gives a lien for materials furnished in the building of a ship or vessel in this state, which can be enforced in admiralty.

It is claimed by libellant's counsel that such a lien is given by an act of the legislature of Ohio, entitled, "An act providing for the collection of claims against steamboats and other water crafts, and authorizing proceedings against the same by name," passed February 26th, 1840, and the act explanatory thereof, passed 24th February, 1848.

The first section of the act of 1840 provides "that steamboats and other water crafts navigating the waters within and bordering on this state, shall be liable for debts contracted on account thereof, by the master, owner, steward, consignee, or other agent, for materials, supplies or labor, in the building, repairing, furnishing or equipping the same, or due for wharfage," &c.

In the second section it is provided that "any person having such demand, may proceed against the owner or owners; or master of such craft, or against the craft itself." The next section merely gives directions how to proceed to obtain a warrant of seizure when the craft itself is sued; and the fourth section enjoins upon the clerk to issue a warrant returnable as other writs,

directing the seizure of such craft by name or description, as provided in the third section of the act, or such part of her apparel or furniture as may be necessary to satisfy the demand, and to detain the same until discharged by due course of law.

These are the main provisions of the statute, at least so far as the statute itself concerns our present inquiry. Does this statute give a lien in the technical legal sense of the term? or in other words, does the lien attach to the watercraft, except on seizure, by virtue of the warrant issued, and in the mode and under the regulations prescribed in the statute?

It was clearly the object of the legislature in passing this act, to subject watercraft, of the description named, to be sued, whose owners resided out of the state, or if residents, whose names were unknown to the creditors. The evil formerly existing, and intended to be remedied by the law, was, that creditors could not always discover the names of the owners; and without having their names they could not bring suit against the person, or by attachment against the property. I regard this law as affording a remedy only. There are no words in the act expressly giving a lien, and in the language of the court in the case of *The Canal Boat Huron v. Simmons*, 11 Ohio Reports, "the boat's responsibility is not in the nature of a lien." I apprehend that it is the seizure which creates the lien, and that until the watercraft is actually taken by warrant, and in the mode prescribed by the law, no lien attaches to the property.

This statute is said to be a transcript of the New York statute, under which liens have been enforced by adjudications of the federal courts in admiralty proceedings.

The statute of New York provides for the proceedings *in rem*, in almost the precise language of the Ohio statute, except in one important particular. It declares "that ships or vessels of all descriptions, &c., shall be liable for all debts contracted by the master, commander, owner or consignee thereof, on account of any work done, or any supplies or materials furnished by any mechanic or tradesman, or others on account, or towards the building, repairing, fitting, furnishing or equipping such ships or vessels, and that such debt shall be a lien upon such ship or ves-

The Samuel Strong.

make no apology for quoting somewhat at length from the opinion of the court, delivered in that case, by Judge BIRCHARD. After stating the case he proceeds to comment on the language of the act, and says: "The craft shall be liable." These words have sometimes been spoken of as creating a lien for the demand. But these words are not those usually employed in statutes when the legislature intend to create a lien, strictly speaking. The first section of the act regulating judgments and executions (Swan, Stat. 467), provides that "lands, tenements, goods and chattels shall be subject to the payment of debts, and shall be liable to be taken on execution and be sold." Here the words are the same, and yet this part of the act has never been construed to create a lien. The owner, notwithstanding this clause, can transfer any of the property named, and clothe the *bona fide* vendee with a good title, no matter how much he may be indebted. The 2d section creates a lien: The lands, &c., "shall be bound" from the date of the judgment: the goods and chattels "shall be bound" from the time they are seized in execution. Now if the intention had been to create a lien, that is, to bind the boat, instead of creating a liability to *mesne process* and be substituted as defendant in place of the owners, the fair presumption is, that the words and phrases commonly used to convey that intention, and not those used to convey a different meaning, would have been employed. We therefore declare that the first section of the act does not create a lien. It merely declares a liability, leaving the mode of enforcing it to the subsequent provisions in the act." I have quoted the language used by the court in deciding the case referred to, lest its force might be lost. Aside from its binding authority, I regard the decision as founded on reason and sound principles of law. Neither do I consider its authority invalidated by the case of *Webster v. The Brig Andes*, 18 Ohio R. The language of the court in that case took a wide range, but the question we are now considering was not legitimately involved in its decision.

It is to be regretted that the legislature, in conferring *quasi* admiralty powers and jurisdictions upon the state courts, should have so framed that act as to deprive a class of creditors (whose interests it evidently sought to advance and protect) from avail-

ing themselves of a court of admiralty to enforce their claim : and I have no doubt that the same reasons which induced the passage of the act of 1840, will prompt future legislation to enable the federal as well as the state courts, to carry out the just intentions of the authors of the act referred to.

As the law now is, I am constrained to dismiss this libel for want of jurisdiction.

ELIJAH K. BRUCE *v.* The tackle, apparel and furniture of the
STEAMBOAT AMERICA.

*District Court of the United States. Northern District of Ohio.
In Admiralty.*

HON. H. V. WILLSON, JUDGE.

WILLSON, J.—*Held*, (1) 1. That the maritime lien of seamen for their wages, and material men for supplies and repairs, is a species of proprietary interest in the ship or vessel itself, and which, except on payment, cannot be divested by the acts of the owner or by any casualty.

2. Such lien adheres to the ship and all its parts, wherever found, and whoever may be the owner. It attaches to the parts of a dismantled vessel the same as to a ship or vessel *in integra*.

3. Wherever there is a maritime lien it may be enforced in the admiralty by a proceeding *in rem*. And when the parts of a wrecked vessel are saved by the owners and not by sailors, the court, in marshaling the liens and disposing of the proceeds of the sale of the property, will order payment in discharge of the liens,

1st. To seamen.

2d. To material men.

Decree for libellant, accordingly.

THE case was heard upon the following statement of facts :

It is agreed that Bruce, the libellant, is a citizen and resident of the state of New York : that the steamboat America was owned and enrolled in the state of Ohio at the time when the

(1) NOTE.—I have not been able to obtain the opinion of the judge in full ; so I am obliged to content myself with the syllabus of the case.—EDITOR.

196 DISTRICT COURT OF THE UNITED STATES.

The Tackle, Apparel and Furniture of Steamboat America.

debt for materials sued for was contracted, and at the time she was lost off Point au Pelee, on Lake Erie: that said debt is unpaid and would be a good and valid claim against the steamboat America, were she still navigating the lakes: that some time in November, 1854, said steamboat was sunk off Point au Pelee, in Lake Erie, and after vain endeavors to raise her, was dismantled by her owners, and such of her rigging, apparel, furniture, machinery, &c., as could be removed, was taken from her; and for the purpose of getting the iron, which composed her in part, she was burned to the water's edge: that such of the apparel, rigging, furniture, machinery and iron, as had been thus saved, was brought to Cleveland and seized by the marshal, in this suit. It is admitted that the steamboat America, as a water craft, is wholly abandoned.

Backus & Noble, for libellant. The liens of material men and seamen, were equal and of the same nature and effect on the water craft, except the right of priority of the seamen in marshaling the liens. *The Mary Ann*, Ware's R. 103; *The Jerusalem*, 2 Gallison R. 846; Conkling's Admiralty, 14, 52, 60; Abbott on Shipping, 179 and 292; Rees R. 78; 4 Wheat. 438; 9 do. 409; 3 Kent's Com. 168; 1 Paine C. C. R. 620; 2 Paine, 131; Gilpin's R. 1 and 184; and 8, 12 and 13, Rules of Admiralty Practice.

Spalding & Parsons, for the claimant. The lien of material men becomes extinct when the vessel is wrecked or derelict. The rule of maritime law, that the "mariner's lien attaches and adheres to the last plank of the ship," should not apply to the liens of material men; 1 Haggard's R. 227; Abbott on Shipping, 754; *The Elizabeth and Jane*, Ware's R. 41; *The Eastern Star*, Ware's R. 186; *The Down*, Davies' R. 128; *The Sloop Louisa*, 2 Wood and Minot R. 56, and Rule 12 of the Admiralty Practice.

The Propeller Charles Mears.

LUMAN PARMLEE AND JOSEPH R. MCGINNIS v. THE PROPPELLER CHARLES MEARS.

*District Court of the United States. Northern District of Ohio.
In Admiralty.*

HON. H. V. WILLSON, JUDGE.

1. Where a libel is filed to enforce a lien upon a domestic vessel, it must be distinctly set forth in the libel, by what municipal regulation or state law, such lien is conferred.
2. When a libel is filed to enforce a lien under the general maritime law, such facts must be set forth in the libel, which if proven, would satisfy the court, that the vessel was a foreign vessel at the time the lien attached.
3. The home port of a vessel, is the place where the law requires her to be registered, not necessarily the place where she was built.
4. When the general maritime law gives the mechanic or material man a lien for labor and materials, in the building of a vessel, the admiralty has jurisdiction to enforce it by a process *in rem*, even before the vessel is launched or employed in navigation.
5. When a libel is filed to enforce a lien against a vessel before she is actually employed in navigation, the libel must show that the vessel is of the size and build fitted for maritime employment, and that her business was to be maritime navigation upon the lakes or high seas.
6. Independent of the act of 1845, extending the jurisdiction of the district courts upon the lakes, the maritime law has the same application to cases upon the lakes, as it has to those upon tide waters, both as to jurisdiction, and to forms of procedure and practice.
7. Whatever are deemed material, and sufficient averments in a libel upon the seaboard to give jurisdiction, would be considered the same upon the lakes.

IN December, 1855, C. Mears & Co., of Chicago, Illinois, agreed with Luther Moses, of Cleveland, Ohio, to build the hull of and complete, with the exception of the engine, boiler, &c., a new propeller.

At the same time, they agreed with libelants to build and furnish for said propeller, a new engine, boiler, &c., all to be completed and set up in the propeller ready for use. The agreement was in writing. The payments not having been made as agreed, the libelants filed their libel and allege substantially:—

198 DISTRICT COURT OF THE UNITED STATES.

The Propeller *Charles Mears*.

1st. That the propeller is of more than twenty tons burden, now lying at Cleveland, and that an agreement was made as above stated.

2d. That libelants performed their part of the contract.

3d. That C. Mears & Co. have not paid as they agreed.

4th to 9th inclusive. That libelants were employed to superintend the work, and furnish other materials, &c., and claiming \$1,587.27.

To this libel the respondents excepted substantially as follows, to the jurisdiction of the court:—

1st. That the contracts of libelants having been made with the owners, there was no lien on the vessel.

2d. That the engine, &c., was furnished before the said propeller was employed in navigation, and before she was enrolled and licensed.

3d. That the libel does not allege enrollment and license; or,

4th. That she was a foreign vessel.

5th. The libel is insufficient, because it does not allege that the propeller was a vessel, or enrolled and licensed, &c.

6th. That it alleged, that the contracts were made with the owners, and consequently show there was no lien.

7th. That it alleges, that the contract was made, the work was done, the propeller was being built, and libelants resided in Cleveland, that consequently Cleveland was the home port of the vessel, &c.

S. B. Prentiss, for claimants, and sustaining the exceptions.

I. This is not a case within the act of February 26, 1845, and no jurisdiction is given by that act, it not being alleged in the libel that the propeller was, at the time of the contract or the furnishing the materials and performing the labor, or at the time of filing the libel, enrolled or licensed for the coasting trade, or at the time employed in business of commerce between ports and places in different states and territories upon the lakes and navigable waters connecting the said lakes. See stat. Conkling's Adm. 8, 821 and note, 864, 865 and note; Benedict's Adm. 141, 142. The libel must state every fact necessary to give the court jurisdiction. Benedict's Adm. 218, § 402, 221, § 408. There must

The Propeller *Charles Mearns*.

be a lien upon the thing to proceed against it *in rem*. Ibid, 213, 214, § 387, 153, § 270; 4 Wheat. 433; 4 Cond. 494.

II. If this was a foreign vessel the lien may exist either by virtue of the general maritime law or of the state law. Conkling's Adm. 68, 69, 70. But if a domestic vessel, the general maritime law gives no lien; and the lien, if any, exists by virtue of the state law. Conkling's Adm. 68, 69, 70; Benedict, 154, 155, § 272. The libel shows no lien by virtue of the laws of this state.

Is there a lien in this case?

The materials furnished and labor performed were furnished and performed under and by virtue of a contract with the owner, for a vessel that was then being built, the contract being made and the labor and materials furnished and performed at the place where the vessel was being built, and nothing appearing in the libel but that that place was her home port, or that she was otherwise than a domestic vessel, nor is it alleged that she was built or designed for maritime business or navigation.

1. The contract being made with the owner, is there a lien?

The articles furnished, except the superintendence, were for the equipment of the vessel, and in furnishing them the libelants were strictly material men, and their rights must be regulated and governed by the law as applicable to material men. Benedict's Adm. 151, 152, §§ 266, 267. The ship consists of the hull and spars, everything else is her equipment. Benedict's Adm. 151, § 266. No lien for materials is ever implied from contracts made by the owner in person. It is only those contracts that the master enters into in his character of master, that specifically bind the ship or affect it by way of lien or privilege in favor of the creditor. When the owner is present, acting in his own behalf as such, the contract is presumed to be made with him on his ordinary responsibility, without a view to the vessel as a fund from which compensation is to be derived. Conkling's Adm. 59; Flanders' Mar. Law, 186, § 241; *Harper v. New Brig*, Gilpin's R. 550-552; 9 Wheat. R. 409; 5 Cond. Rep. 635, 636; *The Phæbe*, Ware, 263; Crabbe's Rep. 199-208. And to this rule there is no exception in favor of persons furnishing materials or labor

200 DISTRICT COURT OF THE UNITED STATES.

The Propeller *Charles Mears*.

for the original construction or building of a vessel. Conkling's Adm. 66.

2. For materials furnished to a domestic ship, the material man has no lien on the ship except it be given by the state law. Abbott on Ship. 148 and note; do. 148 and note; 1 Kent's Com. 379; 3 do. 168-170; Flanders' Mar. Law, 183-186; Conk. Adm. 56, 57; 4 Wash. 453; Gilpin's R. 550-552; do. 473, 477-480; 9 Wheat. R. 409; 5 Cond. Rep. 435, 436; 1 Paine's R. 620; 4 Wheat. 438; 4 Cond. 494; 2 Gall. R. 345; 7 Peters, 324; 1 Sumner, 73; 1 Story, 68, 244; Crabbe's Rep. 199-203; Davies' R. 71.

3. The materials and labor in this case being furnished and performed while the vessel was being built, and before she was enrolled and licensed for the coasting trade, or employed in business of commerce or navigation, &c., the claim is not within the jurisdiction of the court, either under the general maritime law or the act of February 26th, 1845. See stat. in Conkling's Adm. 3; 1 Baldwin's R. 544-568; Crabbe's Rep. 199-203.

C. W. Noble, for libelants.

1. The jurisdiction of this court in this case does not depend upon the statute of 1845. We have a general maritime lien. *Fishugh et al. v. Propeller Gen. Chief*, 12 Howard, 443; Benedict's Adm. 471; Rules of Sup. Ct. United States, No. 12; *De Lovio v. Boit et al.*, 2 Gallison, 398; Benedict's Ad. §§ 209, 211, 212, 213, 261, 265, 267, 270, 271; Constitution of United States, art. 1, §§ 8, 10; *Ibid*, art. 3, § 2; 1 Term Rep. 109; Cowper, 689; 1 Sumn. 73, 81; Ware, 556; 1 Curtis, 253; 1 Story, 244.

2. This is strictly, and to all intents and purposes, a foreign vessel, and the contract is strictly a maritime contract. The residence of the owners determines what is the home port of the vessel, and the residence of the owners is sufficiently stated in the libel to be at Chicago, Illinois. Abbott on Shipping, 179, note; 1 United States Statutes at Large, 55, 288; 2 *Ibid*, 35, 313; Benedict's Admiralty, §§ 24, 26, 28, 273, also p. 471; 15 Johnson's Reports, 298; Law's Jurisdiction and Practice, 8; 5 McLean's Reports, 269, last clause of judge's opinion; Conkling's Admiralty, 419, 66, 67, 69.

The Propeller *Charles Mears*.

8. It is not necessary that the vessel should be enrolled or licensed under the general maritime law, or engaged in commerce or navigation between ports and places in different states and territories upon the lakes or navigable waters connecting said lakes, nor need it be set forth in the libel. 1 Story's Rep. 244; 2 Gallison R. 398; 1 Sumner, 78, 81.

4. The fact that the owners are personally liable does not destroy the lien. The master, when he pledges the ship, does so only by virtue of his agency for the owners, and his contracts bind not only the ship but also the owners. If he could not bind the owner he could not bind the ship. 1 Sumner, 73; 10 Missouri, 531; 4 Wash, 457; 1 Term R. 109; Cowper, 639; Benedict's Adm. §§ 265, 266; Blatchford's C. C. Reports, 570; Rule 12, Sup. Ct.; Law's Juris. and Prac. 8, 190, 194; Gilpin's R. 478.

WILLSON, J.—A libel *in rem* is filed in this case for a balance claimed to be due on a contract alleged to have been made on the 8th day of December, 1855, between the owners of said propeller and the libelants, under which contract the libelants built and furnished a steam engine, boiler and other machinery for said vessel. The alleged consideration to be paid for the engine and other materials was \$6,890; of which amount the sum of \$1,290 is claimed to be due and unpaid. The libelants also claim the further sum of \$150 for superintendence in the building of the propeller; and aver that, at the time of making said contract and furnishing the machinery under it, the vessel was in process of construction, at the port of Cleveland, in the state of Ohio.

Thomas Mears, of the state of Illinois, has interposed his claim as sole owner of the propeller, and filed exceptions (seven in number), to the sufficiency of the libel, and to the jurisdiction of the court.

I deem it unnecessary to examine or consider these exceptions in detail.

The libel is defective, for the want of two material allegations. It does not state the residence or citizenship of the owners of the propeller at the time of making the contract and obtaining

The Propeller Charles Mears.

the labor and materials for the vessel. Neither does it set forth specifically the tonnage, purposes and intended use of said propeller, when built.

If the owners, at the time of entering into this agreement, and procuring the work and materials, were residents of the state of Ohio, then the propeller was a domestic vessel, and no lien attached unless the local law gave a lien; in which case it should have been distinctly set forth in the libel by what municipal regulation or state law such lien was conferred. If the libelants rely upon a general maritime lien, they should spread upon the record these facts, which, if proved, would satisfy the court that the propeller, at the time of her construction, was a vessel foreign to the port of Cleveland.

The place of building a ship or vessel, does not necessarily determine her home port. The home port is the place where the law requires her to be registered or enrolled. By the 3d section of the registry act of December, 1792, it is provided, "that every ship or vessel hereafter to be registered, &c., shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong at the time of her registry, which port shall be deemed to be that at or near to which the owner, if there be but one, or if more than one, then where the ship's husband or managing owner, usually resides." And by the 4th section of the act of 1789, it was declared that the port to which any such ship or vessel shall be deemed to belong, is that, or nearest that in which the owners usually reside.

If, in this case, the facts are as claimed by counsel in the argument (though not apparent on the record), that C. Mears & Co., the owners of the propeller, were residents of Chicago, at the time of making the contract, and of building the propeller at Cleveland, then the vessel had the *status* of a foreign ship, and as such became subjected to all the incidents and responsibilities of a general maritime lien to the material men in her building. All jurists agree, that contracts for the building of ships stand upon precisely the same ground as contracts for repairing, supplying and navigating them. They are maritime contracts, for maritime service, and the admiralty jurisdiction as rightfully

The Propeller *Charles Meara*.

attaches in the one case as the other. *The Jerusalem*, 2 Gallis. 347 ; Gilpin R. 473 ; *The Hull of the New Brig*, 1 Story R. 244.

Where the general maritime law gives the mechanic or material man, a lien for labor and materials furnished in the building of a vessel, the admiralty has jurisdiction to enforce it by process *in rem*, even before the vessel is launched or employed in navigation. The law in such cases, gives the lien upon the water craft as an auxiliary to the personal security of the owner. It has its foundation in the same reasons that create a lien for repairs upon a ship in commission, when those repairs are made in a foreign port. In the case before us, it is no valid objection to the lien, that the labor was performed, and materials furnished in the building of the vessel, by virtue of a contract with the owners residing abroad. A contract with the ship's husband for supplies in a foreign port, is effectual to bind the owner *in personam*, while at the same time, the debt for the supplies is a lien upon the ship. The ship's husband in such a case binds the owner. The debt is created for the benefit, and on account of the owner. The contract is in effect with the owner, though made by his agent, the ship's husband ; and the lien attaches to the ship to secure the payment of the debt created by the contract, for the sole reason, that the owner resides abroad. Now, it is for the same reason, the lien attaches to the vessel, where labor and materials are furnished in her building by virtue of a direct contract with the foreign owner. It is because the owner resides abroad. This policy of the law has a double purpose ; it advances and facilitates the means of commerce, and secures and protects the material man against the necessity of resorting solely to the personal responsibility of a foreign debtor, in a foreign tribunal, to enforce a maritime contract.

To give the admiralty court jurisdiction in such a case, however, the libel and record must show, that the vessel is of the size and build fitted for maritime employment, and that her business was to be maritime navigation upon the waters of the lakes, or upon the high seas. The libel in the present suit is defective in this particular, and for that cause the claimant's exception in that behalf, is sustained.

It is further objected by counsel for the claimant, that the

204 DISTRICT COURT, OF THE UNITED STATES.

The Propeller Charles Means.

libel does not contain averments, bringing the case within the provisions of the act of 26th February, 1845, entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same."

It is provided in this act of Congress, "that the district courts of the United States shall have, possess and exercise the same jurisdiction in matters of contract and tort, arising in, upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters, connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats, and other vessels employed in navigation and commerce upon the high seas or tide waters, within the admiralty and maritime jurisdiction of the United States."

It is insisted that this court has not admiralty jurisdiction to enforce a maritime lien, except such lien accrued while the water craft was actually enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories.

The forms prescribed for proceeding under this statute, by the learned judge of the District Court for the Northern District of New York, in his excellent treatise upon the jurisdiction of the United States courts in admiralty and maritime causes, would require the libellant to aver, that the debt accrued while the vessel was in actual commission and engaged at the time in the business of commerce and navigation. Such undoubtedly was the requirement of the law, when Judge CONKLING published his work upon the admiralty jurisdiction. It was in accordance with the decisions of the Supreme Court of the United States in the cases of the *Thomas Jefferson*, 10 Wheat. Rep. 428, and *The Steamboat Orleans v. Phœbus*, 11 Peters' Rep. 175. But since then, those decisions have been reversed and overruled, and the Supreme Court, in the case of the *Propeller Genesee Chief v. Fitzhugh*, 12 Howard Rep. 443, has placed the admiralty jurisdiction of the lakes upon the same basis as that of the tide and salt

waters. Hence now, independent of the act of February, 1845, the maritime law has the same application to cases upon the lakes as it has to those upon tide water, not only in matters of jurisdiction, but also in forms of procedure and practice. I certainly see nothing in the argument of counsel to change the views of this court, as expressed upon the same question, in the opinion delivered in the case of *William G. Woolverton qui tam v. William Lacey*, and decided at the last February term.

If the District Court has jurisdiction in a given case upon the seaboard, like jurisdiction obtains upon the lakes. What would be deemed material and sufficient averments in the libel to give jurisdiction, in one case, would be regarded as material and sufficient averments in the other.

The exceptions to the jurisdiction of the court over the subject matter of the suit, are overruled, and the fourth and seventh exceptions to the sufficiency of the libel, are sustained.

The libelants have leave to amend and the case is continued.

JOHN KYNOCH *v.* THE PROPELLER S. C. IVES, WILLIAM C. NEILSON, Claimant.

*District Court of the United States. Northern District of Ohio.
In Admiralty.*

HON. H. V. WILLSON, JUDGE.

1. The contract in this case is an executory contract for the purchase of a vessel; conveying no legal title to the libelant, but simply investing him with an equitable interest. The Court of Admiralty will not hold an equitable title sufficient to justify its interposition against the legal title to obtain possession, although it may sometimes deem such an equitable interest sufficient to restrain it from interference from an existing possession under it.
2. Where one has a mere equitable title without having possession under it; *Held*, that admiralty had no jurisdiction to sustain a libel for possession.
3. Courts of admiralty have no general jurisdiction to administer relief as courts of

206 DISTRICT COURT OF THE UNITED STATES.

The Propeller S. C. Ives.

equity. They cannot entertain a libel for specific performance, to correct a mistake, to give relief against fraud, &c., 3 Mason, 16.

4. The jurisdiction of the District Court of the United States, under the ninth section of the judiciary act of 1789, embraces all cases of a maritime nature, whether they be particularly of admiralty cognizance or not. They are not embarrassed by the restraining acts of Richard II and Henry IV, but are governed by the principles of maritime law recognized in maritime nations of continental Europe.
5. The twenty-second rule in admiralty, prescribing the mode of procedure in petitory and possessory suits requires a joint proceeding *in rem*, and *in personam*.
6. To allow a libel in such a case to be amended so as to proceed for damages *in personam*, would be inconsistent with the established rules of admiralty practice.

// THE libel was filed August 6th, 1856, and sets forth that on the 9th day of May, 1856, the claimant, Wm. C. Neilson, being the owner of the propeller S. C. Ives (then called the Dick Tinto), entered into a contract for the sale to the libelant, of one-half of said propeller, her steam pump, submarine armors, &c., of which contract the following is a copy :

"This agreement made this 9th day of May, 1856, by and between William C. Neilson of the city of Cleveland, in the county of Cuyahoga, and state of Ohio, of the first part, and John Kynoch, of the city of Buffalo, county of Erie, and state of New York, of the second part, witnesseth :

"That the said party of the first part hereby agrees to sell and convey to the said party of the second part, or to any other person whom the said Kynoch may designate, on or before the first day of July, 1856, one undivided half of the steam propeller Dick Tinto, as by enrollment number thirty-eight, of the district of Cuyahoga, at Cleveland aforesaid ; the said propeller to be fully fitted and in order for wrecking, having on board all the appurtenances, consisting of boats, anchors and chains, lines, tools and such other small articles as are usually required by a boat in the wrecking business, and her condition as such to be approved by Jonathan Austin, marine inspector at said city of Buffalo, and such undivided half to be delivered at Buffalo aforesaid ; also, one undivided half of the Worthington steam pump, now owned by the party of the first part ; also, one undivided half of two submarine armors, with pumps, hose, lines and everything appertaining thereto ; also, one undivided half of seven heavy screws

The Propeller S. C. Ives.

used for wrecking; in consideration of which agreement to sell and convey, the said party of the second part hereby agrees to pay to the said party of the first part the sum of seven thousand and six hundred dollars, in manner following, that is to say: One thousand dollars on or before the first day of July, 1856, two hundred and fifty dollars on the first day of September, 1856, two hundred and fifty dollars on the first day of December, 1856, two thousand and one hundred dollars on the first day of July, 1857, two thousand dollars on the first day of July, 1858, and two thousand dollars on the first day of July, 1859, with interest on the said sums to be paid on the first days of July, 1857, 1858 and 1859, at the rate of six per cent. per annum from and after the first day of July, 1856, until the said payments are made. In witness whereof we have hereunto set our hands the day and year first above written.

(Signed)

"WM. C. NEILSON,

"JOHN KYNOCH.

"In presence of BENJ. H. AUSTIN, Jr."

Annexed to this contract was a guaranty by Neilson as to the net earnings of Kynoch's moiety.

// The libel further alleged that as a part of the consideration of said contract, it was agreed that Kynoch should have the sole charge and management of the propeller, and that she should be employed in the business of wrecking: that the propeller had been fitted out according to the contract, payment tendered by the libellant, and possession and a conveyance of a moiety demanded, but that said Neilson refused to make any conveyance or give possession, declaring it to be his intention to send the propeller on a voyage to the St. Clair river, beyond the reach of libellant.

The libel, therefore, prayed process against the propeller, and a decree for the possession, offering to give bonds *pendente lite* for her safe return to abide the decree, and also for a monition to Neilson to show cause why he should not be required to perform, all and singular, the undertakings to his agreement.

To this libel, exceptions to the jurisdiction of the court were filed by *Willey & Cary*, proctors for claimants, on a preliminary

208 DISTRICT COURT OF THE UNITED STATES.

The Propeller S. C. Ives.

hearing of which the court refused to grant possession to the libelant, but ordered possession to be redelivered to the claimant Neilson, on his entering into the usual stipulation, with sureties, &c. //

Willey & Cary, in support of the exceptions, insisting, on the final hearing :

I. That the agreement upon which the libel proceeded was not a maritime contract in contemplation of admiralty. 1 Conkling Ad. 9 ; 2 Gallison, 468.

II. That the agreement was executory. Story on Contracts, § 18 ; Story on Sales, § 296 ; 2 Kent, § 496.

III. That the court in admiralty will not take cognizance of contracts preliminary to maritime contracts, or entertain a proceeding for the specific performance of executory contracts, or dispossess a party holding the legal title on the application of a party representing a mere equitable title. *The Pitt*, 1 Haggard, 240 ; 4 idem, 277 ; *The New Draper*, 4 Robinson, 287 ; 5 idem, 161 ; Curtis' Ad. Dig. 17 ; *Davis v. Child et al.*, Davies' R. 71 ; 2 Peters' Ad. R. 397 ; 1 Dall. R. 49 ; *The Tribune*, 3 Sumner, 144 ; Ware, 450 ; 3 Mason, 6-16 ; 1 Kent, 370 ; 2 Paine C. C. R. 124 ; 1 Blatch. & Howland, 136 ; Idem, 385 ; 2 W. & M. 87.

IV. That the court will not allow a libel to be so amended as to engraft a proceeding *in personam* upon a proceeding *in rem*, and that it would be irregular to combine them. 2 Conk. Ad. 613 ; *The Orleans*, 11 Peters, 175.

S. B. & F. J. Prentiss and *Austin*, of Buffalo, for the libelant, cited 2 Kent, §§ 468, 477, 492 ; 13 Eng. Com. Law, 199 ; Chitty Con. 874, 875 and note ; 3 Mason, 110 ; 2 Blackstone, 448 ; 3 Sumner, 144 ; and reviewed the cases cited for claimant.

// WILLSON, J.—The libel in this case, partakes much of the character of a bill in chancery, which seeks to enforce the specific performance of a contract, for the purchase of property. It also seeks the further object of obtaining, for the libelant, the possession and control of the propeller *S. C. Ives*.

The only question in the case, is, has this court jurisdiction of the subject matter of the suit ?

As a preliminary inquiry, it is proper to examine and determine the effect of the contract referred to in the libel, upon the title to the moiety of the vessel claimed to be purchased; or in other words, to determine the question whether Kynoch obtained by the contract, a legal, or only an equitable title to the property.

This depends upon the character the law gives to the agreement itself. If it is an executed contract, then the legal title passed by the instrument to Kynoch; if it is an executory contract, then only an equitable title passed.

The law declares that "a contract is executed when nothing remains to be done by either party, and when the transaction is completed the moment the agreement is made. An executory contract is an agreement to do some future act." Sto. on Con. § 18.

"If anything remains to be done, as between the seller and buyer, before the goods are to be delivered, a present right of property does not attach to the buyer." 2 Kent's Com. 495. This is a well established principle in the doctrine of sales. We must look, then, to the contract itself, to learn the intention of the parties, and to determine its legal effect as to the passing of title to the property *in presenti*.

In the contract it is stipulated in these terms: "That the said party of the first part (Neilson) hereby agrees to sell and convey to the party of the second part (Kynoch), or to any other person whom the said Kynoch may designate, on or before the first day of July, 1856, one undivided half of the steam propeller 'Dick Tinto,' &c., the said propeller to be fully fitted and in order for wrecking, having on board all the appurtenances, consisting of boats, anchors, chains, &c., and such other small articles as are usually required by a boat in the wrecking business, and her condition as such to be approved by Jonathan Austin, marine inspector," &c.

There are two distinct features in this agreement which give it the unmistakable stamp of an executory contract. One is, the provision for the subsequent act of Austin in giving his approval of the requisite condition of the vessel; and the other, the palpable intention of the parties that the legal title should remain in Neilson until Kynoch should designate whether it should be conveyed to himself or to some other person. Suppose Neilson

210 DISTRICT COURT OF THE UNITED STATES.

The Propeller S. C. Ives.

failed to equip the vessel, and the consequent disapproval of Austin of her condition followed; could it be claimed that Kynoch, on the first of July, would be obliged to receive the bill of sale and be bound for the payment of the purchase money? Certainly not. Such a proposition would be as absurd as the hypothesis that Neilson could, after the execution of the contract, convey the legal title to a third person when that title was in Kynoch. In the interpretation of written contracts, the courts are bound to ascertain and declare the intention of the parties to them. Now, I apprehend, that by the well settled rules of the construction of written instruments, the purchase of the vessel here by Kynoch was contingent. If the propeller should be fitted out by Neilson suitable for wrecking by the first of July; and if such fitting out and equipment should be approved by Austin; and if after such equipment and approval, the moiety should be delivered at Buffalo, then Kynoch agreed to purchase and pay the consideration named in the contract.

To perfect the sale and purchase, these things were to be done in the future by Neilson, which if not done discharged the vendee from the terms of the purchase, and this negatives the possibility of legal title in the purchaser. I am clear that Kynoch obtained by the agreement only an equitable interest in the vessel.

If the libellant, then, has only an equitable title to the property, how stands this suit? We have in the record the case presented: First, an equitable owner, not in possession, seeking by a proceeding *in rem*, the interposition of a court of admiralty to give control of the vessel; and second, a demand upon a court of admiralty to decree the specific performance of a contract for the purchase of vessel property.

It has long been settled that a court of admiralty will not hold an equitable title sufficient to justify its interposition against a legal title to obtain possession, although it may sometimes deem such an equitable interest sufficient to restrain it from interference with an existing possession under it. The province of the admiralty is to carry into effect the declarations of the maritime law. Titles to ships and vessels depend chiefly upon the maritime law, as recognized and enforced in the common law. It is laid down by Godolphin, and also by Brown and in Clerk's Praxes,

that suits in admiralty touching property in ships, are of two kinds; one called petitory suits, in which the mere title to the property is litigated and sought to be enforced, independently of any possession which has accompanied or sanctioned that title; the other, called possessory suits, which seek to restore to the owner the possession, of which he has been unjustly deprived, when that possession has followed a legal title, or as it is sometimes phrased, when there has been a possession under a claim of title with a constat of property.

I am aware, that so far as the question of jurisdiction is concerned, this distinction between petitory and possessory suits has never obtained recognition by the courts in this country. The early decision of Judge STORY in the case of *De Lovio v. Boit*, 2 Gal., furnished an authority which has been acted upon with confidence by the courts ever since. And this distinction has lately been substantially abolished even in England by the 3 and 4 Victoria, entitled "An act to improve the practice and extend the jurisdiction of the high Court of Admiralty" in England. But with all this growing liberality and modern favor towards the jurisdiction of the courts, it has never been held or claimed anywhere, that in contests between part owners of a ship for possession or disputes about title, the admiralty would entertain jurisdiction to support an equitable title for either purpose. Possession must follow the legal title, and that title lies at the foundation of the jurisdiction. It belongs to other tribunals to establish the legal title, and when that is done, such title brings with it all its incidents in controversies between part owners in courts of admiralty.

Upon the first proposition, therefore, I hold that the libellant, not having had possession of the propeller, cannot, upon a mere equitable title, come into this court and ask possession and control of the vessel.

In the second place, can the demand made in this libel for the specific performance of the contract in question, be enforced in the admiralty?

Courts of admiralty have no general jurisdiction to administer relief as courts of equity. If a maritime contract is broken, the admiralty, concurrent with courts of law, can only give damages

for the breach of it; whereas the chancery may compel the party, in some cases, to a specific performance. A court of admiralty has no more power to decree such specific performance, than it has to set aside the contract for fraud, or correct a mistake, or decree the execution of a trust. These are matters properly subject to the cognizance of courts of equity and not of the admiralty. Both courts have their origin in the polity of the civil law. From the time the Rhodian Code was incorporated into the Pandects, the maritime law has ever been declared in written ordinances and codes of maritime regulations. The admiralty courts had no power to modify or change them. On the contrary the Prætors of Rome exercised jurisdiction in cases where there was no written law to govern them, and granted relief where, by the enforcement of the written law, equity and good conscience would be perverted. In the Pandects it is said: "*Jus autem civil, est, quod ex legibus, plebiscitis, senatus consultis, decretis principum, auctoritate prudentium venit. Jus prætorium est, quod Prætores introduxerunt, adjuvandi, vel supplendi, vel corrigendi juris civilis propter utilitatem publicam; quod et honorium dicitur, ad honorem prætorum sic nominatum.*"

Such departure from written ordinances and codes of maritime regulations was never known in courts of admiralty, although, as to form, their course of proceeding has always been in accordance with the Roman law.

But the decisions of our own courts are decisive of the question. In the case of *Andrews & Shepherd v. Essex Fire and Marine Ins. Co.*, 3 Mason R. 16, Mr. Justice STORY broadly declares that courts of admiralty cannot entertain a libel for specific performance, or to correct a mistake, or to grant relief against fraud. Courts of admiralty, he says, "have jurisdiction over maritime contracts when executed, but not over those leading to the execution of maritime contracts. If there were a contract to build a ship, or to sign a shipping paper, or to execute a bottomry bond, and the party refused to perform it, the admiralty cannot take jurisdiction and enforce its performance. But if the contract be maritime and executed, the jurisdiction attaches; and the admiralty may then administer relief upon it according to equity and good conscience. The law looks to the proximate,

and not to the remote cause, as the source of jurisdiction, and deals with it only when it has assumed its final shape as a maritime contract.

Such being the rules of law governing the admiralty jurisdiction of this court, it follows that we have not cognizance of the subject matter of this suit in a proceeding *in rem*.

But it was claimed by the counsel for the libellant, in the argument, that the contract of purchase being maritime, the case should be retained and proceeded with *in personam* upon the question of damages for a breach of the contract.

It is, perhaps, unnecessary to determine whether this contract is, in its nature, maritime or not. //

There has been some diversity and conflict of opinion as to the import and meaning of the word maritime as expressed in the clause of the constitution and in the judiciary act, to wit, "all causes of admiralty and maritime jurisdiction." By some it has been contended that the term maritime thus incorporated in the constitution and the act of Congress, is but an unmeaning expletive, inserted merely to round a period, and that it should be used and applied synonymous with the term admiralty as understood in England. By others (and I apprehend with greater weight of authority) it has been insisted that the term so used, has a substantive meaning, and thereby conferred upon the federal courts a more enlarged and extended jurisdiction than was conceded by the common law judges to the high Court of Admiralty in England. Under our constitution we are not subject to the necessity of following the fluctuating line which divided the jurisdiction of the courts of law and of the admiralty in Great Britain during the days of Lord Coke, and for a long period after his time. We look to the powers conferred in the commissions from the crown upon the judges of the vice admiralty courts in this country under the colonial system, and the consequent extent of jurisdiction exercised by those courts, and the state admiralty courts under the confederation, to ascertain the true meaning of the words used in the constitution, giving to the federal courts "all causes of admiralty and maritime jurisdiction." The conclusions arrived at by every intelligent jurist, will be those declared by Mr. Justice WASHINGTON in the case

of *Davis v. The Brig Seneca*, viz: that the judicial power of the United States under the constitution, and the jurisdiction of the district courts under the 9th section of the judiciary act of 1789, embrace all cases of a maritime nature, whether they be particularly of admiralty cognizance or not; and, that this jurisdiction, and the law regulating its exercise, are to be sought for in the general maritime law of nations, and not confined to that of England or of any particular maritime country. The district courts of the United States, sitting as courts of admiralty, are not embarrassed by the restraining statutes of Richard II and Henry IV, but exercise as large jurisdiction, and are governed by the same principles of maritime law, as are recognized by the courts of admiralty in the maritime nations of continental Europe.

I have thus plainly stated my views as to the extent of the admiralty jurisdiction of this court, that, from the decision necessarily made in the present suit, no misapprehension should exist of the purpose of the court to exercise that jurisdiction in all cases of maritime contracts, when they properly arise.

// The obstacle in the way here is not necessarily in the character of the contract, but in the mode of procedure claimed by counsel. The twenty-second rule in admiralty prescribed by the Supreme Court of the United States, directs the mode of procedure in all petitory or possessory suits between part owners or adverse proprietors of a ship. It declares the process shall be by an arrest of the vessel and by a monition to the adverse party to appear and make answer to the suit. The rule requires a joint proceeding *in rem* and *in personam*. The libel is the foundation for the action of the court, and it determines the character of the decree. It cannot be amended to change the form of the action any more than a proceeding in the common law action of ejectment could be changed into an action of trespass.

Such, however, would be the case if the suit should now be allowed to proceed *in personam*. An amended libel seeking damages for a breach of the contract would be the virtual institution of a new suit, and a novelty in admiralty practice.

The exceptions to the jurisdiction of the court are sustained, and the libel dismissed without prejudice, //

WESTERN DISTRICT OF PENNSYLVANIA.

DECISIONS

OF THE

HON. T. IRWIN.

JAMES FOSTER *et al.* v. STEAMBOAT PILOT No. 2.

District Court of the United States. Western District of Pennsylvania. In Admiralty.

HON. T. IRWIN, JUDGE.

1. A seaman who is at the same time a part owner of the vessel in which he serves, is not thereby precluded from libeling in admiralty for wages.
2. A. & B. were, with others, part owners of a vessel, and also served on board her as mariners. The vessel was sold on execution out of a state court, on a judgment against all the owners. *Held*, that the sale not affecting the liens of seamen, A. and B. might libel the vessel in the hands of the purchaser at sheriff's sale, for wages due prior thereto, notwithstanding the former part ownership.
3. The seamen's lien for wages is not discharged by a sale on execution against the owners of a vessel.

LIBEL for wages—the facts and arguments in this case appear in the opinion of the court.

Mr. Pinney, for the libellant.

Mr. Stanton, for the respondent.

IRWIN, J.—On the 7th day of December last, several bills were filed by James Foster and others, for wages alleged to be due them as mariners of the steamboat Pilot No. 2, belonging to the port of Pittsburgh. On the same day, the marshal seized the vessel by process in favor of said libellants, and has since held it

in custody to answer their claims, and to await the adjudication of this court. Prior to the time when the said libels were filed and the attachments served, the said steamboat was taken in execution by the sheriff of Alleghany county, upon judgments obtained in the District Court of said county, against the owners, and after due notice, it was on the 18th day of December, publicly sold by the said sheriff to B. McBride, for the sum of seven hundred and sixty dollars.

On the 21st of December, the said McBride, as intervener, answered the several libels, from which it appears that as purchaser at sheriff's sale, he claims to hold the said steam vessel discharged from any lien which may have existed prior to the sale, and from the claims of the libelants, who are denied to have been mariners in said vessel, as is asserted in the said libels, which, therefore, he prays may be dismissed, and the libelants condemned in costs, &c.

At the hearing, no proof was offered in support of the latter allegation, but it was contended that two of the libelants named, Alexander Woods and Jacob Gallatin, whose claims for wages amounted to the sum of five hundred and eighteen dollars and sixty-three cents, were before and after the voyage last made by the steamboat, and at the time of filing their several libels, its part owners, and that the judgment and execution upon which it was sold, were against the said Woods and Gallatin, as well as against the other part owners, and that, therefore, they have no lien thereon for wages or otherwise. So much of the answer as alleges the part ownership of the vessel by Woods and Gallatin at the time mentioned, is admitted to be true, but it is denied that their claim as mariners of the said vessel for wages due, and their lien as such mariners can in any manner be affected by such part ownership. This is the only question for consideration.

There are principles of law governing mercantile partnerships, which in argument are supposed to involve and settle the points raised by the answer adversely to the claim of the libelants. But it is unnecessary to inquire what would have been the legal effect of the disputed claims, if creditors of the partners of the steam vessel claiming by liens inferior to that of wages, or claim-

ing *in personam*, had intervened to contest the claims for wages, or to inquire whether part owners, not parties to the libel, could successfully intervene to resist the claims for wages of their co-partners, on the ground that such claims, like all other claims between partners in relation to services to the partnership, or connected with the partnership property, can only legally be adjusted and determined according to the law of partnership. Neither creditors nor part owners have intervened; but had either or both events occurred, it must not be inferred that such intervention, under the circumstances supposed, would be regarded as a legal obstacle to the mariner's claims for wages. It is not meant, however, to say more than what properly belongs to the case under consideration, as it may be affected by the proofs exhibited, the principles of maritime law, and as in principle it is distinguished from that assumed in argument.

The respondent is a purchaser of the steam vessel subject to liens for mariner's wages, and as no one else intervened to contest those liens, the inquiry will be confined to what he has set forth in his answer as above noticed, and the proofs and the law which sustain the claims of the libelants.

The claim of mariner's wages has a priority above all other claims against the vessel, the freight, and the proceeds of both, into whosoever hands they may come. It is a permanent lien, and secures to the mariner for his wages, a preference above all other persons, and may be enforced in admiralty against a *bona fide* purchaser, without regard to the title through which the purchaser claims. The respondent purchased the steam vessel at sheriff's sale, eleven days after it had been libeled, and was in custody of the marshal, and while the libelants were proceeding in this court to enforce their liens. He cannot, therefore, allege with truth, that when he purchased her he had no legal notice of these claims. But with or without notice, if all the libelants were mariners, and were all entitled to wages, their lien against the vessel, after as well as before sale, is unquestionable. But whilst this is not denied as a general principle, it is contended that two of the libelants, though they might have been as alleged, employed as mariners in the vessel, yet as part owners of it, they could not by any known principles of law, proceed

by libel in admiralty for the recovery of wages: that all the owners of the vessel were debtors for wages, and all equally liable: that the libelants could not separate themselves from other part owners, and assert a separate claim against the partnership property, which, in effect, would be to claim against themselves as well as against their copartners, nor could they claim against a *bona fide* purchaser of the partnership property under a judicial sale: that such claims for services to the partnership in a steam vessel or otherwise, might be met with similar or equally good claims by other part owners, and that their separate or mutual charges and accounts can only be legally settled by the law of partnership. It was further urged that, if part owners of a vessel had in admiralty a lien for wages as mariners, the right would extend to all other admiralty liens to the exclusion of creditors, and thus open a door to fraudulent claims, which, in most instances, it would be impossible to expose, or successfully resist. The argument in this case is specious, but unsound. The owners of a steam vessel must, from necessity, in a voyage of that vessel, be subject to mariner's wages; and, if it should happen that one of their number should be employed as a mariner, such employment would be in a capacity distinct from, and unconnected with the appropriate business of a partnership of that nature, the object of which is either to let the vessel out to freight, or for mutual adventure in vessel and cargo. As one of the crew, his name would regularly be included in the shipping articles for the voyage; and either by them or other contract, his station and rate of wages would be determined; and while subject to all the penalties and forfeitures, prescribed by the act of Congress for a failure to perform his duties as a mariner, he would, as such, be entitled to the stipulated wages, and the triple remedy which the law provides for enforcing its payment: a lien upon the vessel, the freight and the proceeds of both, regardless of partnership relations and liabilities, unless, by express contract another way of securing his wages had been provided. Without such an agreement, it would be fair to infer that his copartners in a vessel regarded his right to wages as unconnected with, and beyond the control of the partnership. In pursuing the remedy by libel, it would, therefore,

be enough for the libellant to show, by the shipping articles or otherwise, that he shipped as a mariner, and, as such, was entitled to wages, and that his wages were due and unpaid. The act of Congress, which secures this right, is in accordance with the policy and usages of maritime law, which regards, with peculiar favor and tenderness, the situation of seamen, by giving them a lien for wages paramount to all other claims, and a summary remedy for enforcing the right, unaffected by collateral matters, or common law pleadings. But whatever doubt there may be as to the remedy, when a vessel is owned by several in strict partnership, there can be none in a case where they are merely part owners, as the respondents are alleged to be in the answer, and as they must be taken to be in the absence of all controlling circumstances. The general relation of part owners of a vessel, is that of tenants in common and not as copartners; they are, therefore, not liable in *solida*, nor entitled, in the settlement of their accounts, to be governed by the principles of partnership. *Nichols v. Munford*, 4 John. Chan. R. 522; 2 John. 611. There are exceptions, but this case is not one of them; and as liens may arise either from express or implied assignments, it is but a reasonable presumption, when not opposed by special or express contract, that part owners do not intend to rely solely upon the personal responsibility of each other, to reimburse themselves for expenses and charges incurred upon the common property for the common benefit, but that there is a mutual understanding that they shall possess a lien *in rem*. Story's Partn. 444.

The navigation of the western waters by steamboats is often attended with more than ordinary risk and loss; to lessen such risk, it is not unusual for those about to engage in such business to unite in partnership with one or more persons, known to be skillful and trustworthy mariners, whose interest in the vessel, though generally small, is always sufficient to call into action the greatest amount of vigilance, ability and care of which they are capable, an advantage which it would be vain to expect from mariners bound to their duty only by the prospect of ordinary wages.

The law, as explained, harmonizes with this policy, by giving

220 DISTRICT COURT OF THE UNITED STATES.

The Steamboat Pilot No. 2.

to a mariner, though a part owner of a vessel, a maritime lien for his stipulated wages, while it does no injustice to another part owner, or to their creditors, since it adds nothing to the wages which must necessarily be incurred in a voyage. The creditors are generally such as have claims for repairs to a vessel, or for materials furnished, and have often no other security for payment than the lien which the law gives them upon the vessel. Both part owners and creditors have a deep interest in its safe return; and when, to the usual means of promoting that object, is superadded the connection of mariner and part owner, it may be safely assumed, that it would be impolitic, unjust, and contrary to the principles of maritime law, to deny to the mariner his claim for wages. Upon full consideration, made the more necessary from the absence of a reported case of a similar nature, I feel satisfied that the claims of the libelants are fully sustained by the proofs and the law.

Decree accordingly.

NORTHERN DISTRICT OF ILLINOIS.

DECISIONS

OF THE

HON. T. DRUMMOND.

EDWIN HUNT *v.* THE PROPELLER CLEVELAND.

District Court of the United States. District of Illinois. In Admiralty.

HON. T. DRUMMOND, JUDGE.

1. Several casks of hardware were shipped from Ogdensburgh, N. Y., to Chicago, by bill of lading, to be delivered in good order, dangers of navigation excepted; the goods being found damaged at Chicago, it devolves upon the carrier to prove that it was within the exception of the bill of lading.
2. Facts having been proved from which this could be fairly inferred, it devolves upon the shipper to prove that the damages could have been prevented by the exercise of reasonable care and skill on the part of the carrier. And it must not be a matter of doubt, but it must clearly appear, that there was negligence or want of skill on the part of the vessel.
3. It is a useful and proper precaution for a master of a vessel to note a protest at the first port of his arrival; after an accident, but it is not an indispensable duty.

Mr. Stickney, for libellant.

Mr. Waite, for claimant.

DRUMMOND, J.—On the 8th of October, 1851, were shipped on the propeller Cleveland, at Ogdensburgh, New York, several

222 DISTRICT COURT OF THE UNITED STATES.

The Cleveland.

casks of hardware for Chicago, belonging to the libellant. On the arrival of the propeller at Chicago, on the 1st of November, when the casks were opened and examined, it was ascertained that the hardware had been wet and damaged to an amount varying from three to five per cent., according to the kind of goods. The libel alleges that this damage was sustained in consequence of the carelessness and unskillfulness of the carrier. The claimants, in their answer, insist that the injury was the result of the dangers of the sea, and was unavoidable. The bill of lading states that the merchandise was shipped in good order and condition, and was to be delivered in like good order and condition—the dangers of navigation only excepted. The sole question in the case is whether the damage was within the exception in the bill of lading.

The proof is that the vessel was tight, staunch, well manned and equipped in every respect.

The injury being established, it is incumbent on the carrier to show that it was caused by the dangers of navigation, and if it appear it was the consequence of such dangers, then it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill on the part of the carrier. *Clark v. Barnwell*, 12 Howard Rep. 272.

Apply these principles to the facts in this case. The casks were stowed in the after part of the forward hold, which was a proper and safe place for that kind of merchandise. The propeller had a cargo of various goods, for Cleveland, Sheboygan, Port Washington, Milwaukee, Racine, Southport and Chicago. Nothing of importance occurred till the 16th of October, when being off Saginaw Bay, the cylinder of one of the engines broke, and other damage was done, which compelled the vessel to return to St. Clair to repair. The engine was repaired and they left St. Clair on the 21st. After leaving St. Clair, and passing Point of Barques, about midnight of that day they were met with a very severe gale from the west. The sea made a clean breach over the vessel, washed things from the promenade deck, stove in the larboard gangway, which caused her to ship a considerable quantity of water, which went through the hatchway into the fire-hold, and to leak. All hands were immediately called

The Cleveland.

and set to pumping. The propeller was put head to the wind and worked up under the lee of the land. At the end of about four hours' labor, they succeeded in freeing her from the water, and she did not afterwards leak more than usual. The gangway had been well and securely fastened. They had heavy weather the remainder of the voyage, but nothing further occurred of any moment. The witnesses who testify to these facts are the captain, the engineer, the clerk and the mate. There is no contradictory testimony. They all concur in the belief, that whatever damage was done to the hardware was in this gale of wind, and that no human skill or prudence could have prevented it.

It seems fairly to be inferred from the proofs, that the damage was caused by the gale of wind, which resulted in wetting the merchandise, either by leakage of the vessel or by shipping water. The damage is thus shown to be caused by the dangers of navigation. It follows, that the shipper must establish negligence or want of skill in the carrier. It must not be matter of doubt merely, but it should clearly appear that there was a want of proper care, skill or diligence. Now, in this case, the court must be satisfied, notwithstanding the statements of the witnesses that there was proper care and skill, that there was not. It is certainly true that the court is not bound by the mere statements of the witnesses on this point; but facts must appear from which the court is able to infer there was a want of due care on the part of those who had the management of the propeller. There is nothing in the facts shown, to warrant such a conclusion. The testimony comes from those on board of the vessel, and this should lead to great caution in receiving it. Any considerable experience in this class of cases teaches us to scrutinize closely everything that may be said. But the testimony cannot, obviously, come from any other source. We must endeavor to draw just conclusions from it, making all due allowance for the influences which may be supposed to affect the minds and memory of the witnesses.

Some stress was laid on the circumstance of there having been no protest noted until the arrival of the vessel in Chicago, notwithstanding she stopped at various places before her arrival at that port.

It is a useful and proper precaution for a master of a vessel to note a protest on his arrival at the first port—when it is in his power to do so—in all cases where any accident has occurred, or any injury been sustained, or any possibility thereof; but it is not an indispensable duty, without which the carrier cannot be relieved from liability. It is always highly desirable that a statement should be made of all the circumstances attending any casualty or accident on ship board, while the facts are fresh in the mind, and before controversy has sprung up in relation to them. Still, if it be omitted, it operates against the carrier only by throwing a cloud over the transaction—at most, by casting something of suspicion on the affair. It cannot be said that the omission of the carrier shall throw upon him all the consequences of negligence in a clear case of none in fact. It may well have its effect in a doubtful case, but not in one where there is nothing to cause the mind to hesitate in its conclusion. Abbott on Shipping, 497 (side paging 380); 9 Leigh's R. 54; Conkling's Admiralty, 684, &c.; *Senat v. Porter*, 7 T. R. 158; Arnould on Insurance, 1337; *The Emma*, 2 W. Robinson R. 315.

There was a protest noted and properly extended on the arrival of the propeller at Chicago, but it has not been introduced. No objection has been taken on that point by the libellant. It is said to be lost or mislaid. I think it is reasonable to conclude, under the circumstances of this case, if it were here it would shed no new light upon the subject of this controversy.

The libel must be dismissed with costs.

EBER B. WARD and SAMUEL WARD, Owners of the STEAM-
BOAT ST. LOUIS v. THE PROPELLER A. ROSSITER.

*District Court of the United States. District of Illinois. In
Admiralty.*

HON. T. DRUMMOND, JUDGE.

1. A steamer, in entering the harbor of Chicago in the night, at a speed of three and a half to four miles an hour, while another steamer was in the act of turning, just above a bend in the river, came in collision with the latter, at that moment lying across the river; *Held*, The former was in fault, and was liable for the damages done. The river was full of craft, and the speed of the steamer was too great under the circumstances.
2. If a steamer, owing to any cause, cannot see its way clear before it, in entering a harbor at night, it is its duty to stop or proceed with extreme caution.

Mr. Shumway, for libellant.

Mr. Goodrich, for claimant.

DRUMMOND, J.—On the 27th of August, 1851, the steamer St. Louis had returned from her nightly trip from New Buffalo to Chicago, and had entered the river and passed a little above her wharf to wind. It was about three o'clock in the morning. There was no regular place at that time for steamers to turn. They winded where they could, though there was a place—the excavation—where it was more convenient and wider than at other places. The St. Louis was in the act of turning, lying across the river (then two hundred and six feet wide only at that place, the St. Louis being one hundred and ninety-five feet long), when the Rossiter came into the harbor at a speed of three and a half to four miles an hour. In turning the bend of the river, not far from the ferry, a little more than seven hundred feet from the spot where the St. Louis was winding, the Rossiter encountered a thick smoke, coming across the river from the ruins of Haddock & Norton's warehouse, then recently destroyed by fire, which prevented those on board, as they al-

lege, from seeing the St. Louis, though the people of the latter assert that they could easily distinguish the Rossiter. The Rossiter blew her whistle as she came up the river. The St. Louis had all necessary lights. The Rossiter was hailed as she approached, but without avail, as she immediately struck the St. Louis and caused damage to the amount of \$258.61. It was a clear starlight night.

These are the material facts in the case.

There can be no doubt that the Rossiter was in fault, and liable for the injury done. If those on board of the propeller could not see their way clear, owing to the smoke, it was their duty to proceed with extreme caution, especially as they were approaching a bend in the river. It is a rule of universal application, that a steamer in entering a harbor at night, crowded with craft as the Chicago river was at that time, shall be held to the greatest diligence and circumspection; and, if owing to fog, smoke, or other cause, they cannot see their way before them, it is their duty to stop, or at least proceed with such slowness that they can stop at a moment's notice. It will not do for steamers to proceed at hap-hazard, and trust to chance to go clear. If they cannot see the way they must stop till they can. I have repeatedly been called upon to investigate cases which have originated from the recklessness with which steamers enter the harbor of Chicago, as well in the daytime as in the night. They must be more careful and vigilant than they have been, or, let it be clearly understood, they will have to answer in damages for the consequences.

A decree will be entered against the claimant and his sureties for the sum of \$258.61 and costs.

GEORGE FOSTER, Owner of BRIG S. F. GALE v. THE SCHOONER
MIRANDA.

*District Court of the United States. District of Illinois. In
Admiralty.*

HON. T. DRUMMOND, JUDGE.

1. The 5th section of the act of Congress of 3d March, 1849, required a vessel navigating the lakes in the night, while on the starboard tack, to show a red light, and a vessel having the wind free, a white light. It also required *sailing vessels* to have reflectors to their lights, and that they should be such as to insure a good and sufficient light, as well as *propellers* and *steamers*.
2. In a collision, in the night, between a brig and a schooner, at the foot of Lake Michigan, the weight of the evidence is, that the brig close hauled on the wind on the starboard tack, had a white light. This was in violation of the act of Congress and was such a fault as to preclude the brig from recovering full indemnity for the damage done by the collision, which occurred while the brig carried such a light.
3. The act of 1849 did not intend to abrogate the rules which have been generally observed for the management of vessels: it only added a new one. But it once being established that the brig had the wrong light, the burden of proving that the loss was not the consequence of it, is thrown upon the brig. The proof clearly shows that, at the time of the collision, the schooner had not a competent look-out. The schooner also should have kept away and not held on her course. It cannot be said, therefore, within the meaning of the act of 1849, that the loss resulted entirely from the neglect of the brig to carry the proper light.
4. Both vessels were in fault, and the loss was divided equally between them.

Mr. Hurd, for libellant.

Mr. Goodrich, for claimant.

DRUMMOND, J.—This is a libel filed by the owner of the brig S. F. Gale, against the schooner Miranda, for damages sustained by the brig, from a collision with the schooner in the fall of 1849.

The brig S. F. Gale from Chicago, with a load of wheat, was proceeding down the lake on her way to Buffalo. When near the foot of Lake Michigan, off Point Waubeshanks, not far from

the light-ship stationed near that point, about three o'clock in the morning of the 11th of October, the collision took place. The wind was south southeast. The brig was close hauled upon the wind with her starboard tacks aboard, steering nearly east. It was a clear starlight night, and a vessel could be discerned and a brig distinguished from a schooner a mile or more distant. Some time before the collision occurred, the light carried by the Miranda, was seen from the S. F. Gale, two points on her bow. The man at the helm was ordered to keep the brig close to the wind, because the light of the Miranda indicated a vessel approaching from an easterly direction. The brig was accordingly kept as close to the wind as possible. The Miranda was bound up the lake, on a voyage from Cleveland to Chicago, and was standing about west by north, and consequently had the wind free. Some time before the collision, those on board of the Miranda had seen the light of the brig, and believing it a white light, supposed it was a vessel on the same course with themselves, and immediately preceding the collision, the watch on the deck of the Miranda had gone aft to lower the peak, with a view to haul round the light ship—a usual and proper precaution—the captain being at the helm. As the two vessels approached, the mate of the brig shouted to those on the schooner, not to run into them. When this was done the helm of the schooner was put hard a-port, and that of the brig put down; but the vessels were so near that at that moment, when apparently for the first time those on each vessel entertained apprehension of a collision, it was impossible to prevent them from meeting, and the Miranda struck the S. F. Gale on the larboard bow, near the fore-rigging. Both vessels were injured, but the brig suffered the most.

By the 5th section of the act of Congress of 3d of March, 1840, making appropriations for light-houses, &c., and for other purposes (9 Statutes at L. 382), vessels, steamboats and propellers navigating the northern and western lakes, are required to comply with certain regulations "for the security of life and property," among which are the following: During the night, vessels on the starboard tack shall show a red light, and vessels going off large or before the wind, a white light; and it is pro-

vided, "if loss or damage shall occur, the owner or owners of the vessel, steamboat or propeller, neglecting to comply with these regulations, shall be liable to the injured party for all loss or damage resulting from such neglect."

This law is undoubtedly binding upon all the classes of vessels mentioned. It follows that it was the duty of the S. F. Gale to carry a red light, and of the Miranda to carry a white light at the time of and previous to the collision. There was no point made as to the light of the Miranda. Those on board of the brig admit that the schooner showed a white light. The evidence, however, proves that it was an ordinary globe lantern without reflectors; and if so, it could hardly be said to come up to the standard required by the law; because I think the words in the act, "said light shall be furnished with reflectors, &c., complete, and of a size to insure a good and sufficient light," apply as well to the lights carried by vessels as to those carried by steamboats and propellers.

The libel alleges that the S. F. Gale carried at the time a red light. The answer of the claimant denies it, and asserts it was a white light. Of course, the dispute is to be determined by the proof. And here is to be found the conflict of evidence which so often occurs, in these cases, between the persons on board of the different vessels. A brief examination will show where the weight of the testimony is upon this point.

Langley, the captain of the brig, merely says they had a red light. Scott, a seaman, states they had a red light on the pawl bits, but he did not notice the Gale's light when he went on deck. It being his watch below at the time, he did not go on deck till the collision occurred. Hitchcock, also a seaman of the brig, who was at the helm, says that at the time the Miranda's light was first discovered, and for more than an hour previous, and up to the time of the collision, the brig showed a red light suspended from the pawl post.

This is the whole testimony on the part of the libellant. The witnesses simply declare the fact to be so, without adverting to any circumstances which show that their attention was particularly called to it, or that they had any special reasons for recollecting it.

The S. F. Gale and The Miranda.

On the other hand Durand, the captain of the *Miranda*, says that he saw the light of the *Gale* about fifteen minutes before the collision, a mile or more distant; that it was a white light. He is positive it was a white light, because the second mate and himself had previously talked of it, and there was no other light in sight except that of the light-ship; and he is certain also, because the *Gale* carried the same light (white) when she shot across the bows of the schooner. Wilgus, the first mate of the *Miranda*, declares he noticed the signal light of the *Gale*. It was a white light, but burned low, giving a dull light. He still saw the same light hanging after the two vessels parted. Isaac Brown, the second mate, was one of the watch on deck at the time. He and the captain spoke together of the white light carried by a vessel then ahead of them as they supposed. They stood some time on the forecastle deck and saw a white light and that only. If the *Gale* had carried a red light, he says, they would not have gone aft to lower the peak of the mainsail. Joseph Brown, a seaman of the *Miranda*, states the brig had a white light, which burnt dim at the time. The light was so near he could not but observe it; and he says it was remarked by others at the time, that the *Gale* carried a white light. Turner, also a seaman of the *Miranda*, says that the *Gale* carried a dim, white light; and is positive it was a white light, because he had heard the captain and second mate previously talking of the light in sight as a white light, and because, when he found the brig was close hauled on the wind, with her starboard tacks aboard, he noticed that she showed the wrong light.

It is apparent, from the foregoing statement of the evidence upon this point, that it predominates strongly in favor of the conclusion that the *S. F. Gale* showed a white light. The witnesses who testify on that side, had their attention particularly drawn to the fact; it was the subject of remark at the time. They saw the light before the collision, and after; their opportunity for observation was favorable, and it seems clear that those on board of the brig who speak to this point were mistaken; or, at all events, the *S. F. Gale* did not show that kind of light which the law required. There can be no doubt the act demands the exhibition of such a red light (when the vessel during the night

is on the starboard tack), as under ordinary circumstances, and more especially in so clear a night as that when this collision occurred, can be distinguished from a green or white light. It is possible the explanation may be found, as has been suggested, in the fact that the S. F. Gale, just before the light-ship was passed, had been sailing with the wind free, and her officers had neglected to change their white light when they changed their course. However this may be, I am forced to the conclusion that the brig was not at the time showing the proper light, consequently those who had charge of her were themselves in fault in that respect. There is some doubt, also, whether there was a good look-out kept on board of the brig. The captain of the Miranda says, if a good look-out had been kept on the brig, the collision might have easily been avoided. This might have been so; but those on board of the S. F. Gale had a right to suppose, as they were close on the wind, the usual rule would be observed by the Miranda—to keep away; whereas as we shall presently see, the course of the schooner was unchanged until the collision was unavoidable.

The S. F. Gale not being free from blame, it follows the owner cannot, under the maritime law, sustain a claim for full indemnity for the damage done.

The next question is, whether within the meaning of the act of Congress, the loss or damage resulted from the neglect of the brig to comply with the requirement of the law, because if that is the case, so far from the Miranda being liable to the S. F. Gale, the latter would be liable to the owner of the schooner for the injury done to the Miranda. And perhaps we cannot better illustrate the principle than by supposing this were a libel filed by the owner of the Miranda against the brig for injury done to the former. Could it be sustained under the circumstances of this case? Conkling's Admiralty, 302.

We have to set out with the admitted facts, that the S. F. Gale violated an express law of Congress. In the case of the collision of the *De Soto* and *Luda*, *Waring v. Clark*, 5 Howard's R. 441, the Supreme Court went out of its way to decide, that if a collision occurs between steamers at night, and one of them has not signal lights, it will be held responsible for all losses

until it is proved that the collision was not the consequence of the absence of signal lights. The court say they do not put the decision of the case on that ground, and they do not determine whether there was an absence of signal lights or not. The real ground of the decision on the merits was, that the *Luda* was run down whilst in the accustomed channel of upward navigation, by the *De Soto*, which was out of that for which it should have been steered to make the port to which it was bound. The opinion of the court in *Waring v. Clark*, was given under the act of July 7th, 1838, which made it the duty of the master and owner of every steamboat running between sunset and sunrise, to carry one or more signal lights. It is said this principle applies also to the act of 1849 which we are now considering, and that the *Miranda* cannot be accountable for any loss to the *S. F. Gale*, until it is shown it was not occasioned by the brig carrying a white light.

Did the collision happen in consequence of the neglect of those who had charge of the brig? It may be admitted that the fact of the brig not having the proper light throws upon the libelants the *onus* of proving the damage was the result of some fault on the part of the *Miranda*. I have come to the conclusion, after an attentive examination of the evidence, that while it may be said the collision might not have happened if the brig had shown the right light, it may also be said it would not have occurred if there had not been fault on the part of the *Miranda*. It is insisted, if it be proved that the brig violated the law, it follows as a necessary consequence that the *Miranda* must stand excused. I do not so understand the law. There are certain rules which are settled in the maritime law, respecting the conduct of vessels at sea, but the neglect of these by one party will not excuse the other for the want of ordinary care and diligence. In a recent case, it seems to be implied that every proper precautionary measure must be taken on the part of the collided vessel to pass the other in safety; and then if a loss happen in consequence of the fault of the other, the damage is attributable to the neglect of this last. *Newton v. Stebbins*, 10 Howard, 605; and see *St. John v. Paine*, 10 Howard, 55, and *The Cynosure*, 7 Law Reporter.

The S. F. Gale and The Miranda.

If the S. F. Gale showed the wrong light, it was not the less the duty of those on the Miranda to observe the usual nautical rules in the management of their schooner. It was not the intention of the act of Congress to abrogate those regulations which have always been observed in the management of vessels. Notwithstanding the brig carried a white light, it was the duty of the Miranda, having the wind free, to keep away, and not to hold on her course. It was a clear starlight night; those on the Miranda had a right at first to presume that the brig was on the same course with themselves. But if it be true as stated, that the captain and mate of the Miranda looked at the light of the S. F. Gale for some time, they must have seen that they were overhauling the vessel ahead at a very rapid rate. It is to be borne in mind that the evidence shows the two vessels were approaching each other at the combined speed of from eight to ten miles an hour. It should have been enough to have excited to watchfulness. The law of Congress is obligatory, but so are all the laws of the sea. There have been many rules and regulations established by the wisdom and experience of nautical men, and sanctioned by the courts for the conduct of vessels, but there is none of more imperative obligation, than the one which declares that when a vessel is approaching another in the night, a competent and vigilant look-out should be kept on board of each. It is a rule prescribed alike by the law, and by common sense and common prudence. Did the Miranda keep such a look-out? It seems to me not. According to the evidence the officers knew they were approaching a vessel. What if it was a vessel on the same course with themselves? They were not the less bound to be vigilant in looking out for her and watching her movements. I concur entirely in the opinion of one of the nautical witnesses examined in court, Capt. Napier, that, even if they had supposed the vessel ahead was on the same course with themselves, still it was their duty to keep a good look-out, and to call all the watch on deck to lower the peak, at a time when they were so near another vessel. It is impossible to escape the conclusion that if this had been done, in so clear a night as that was, it would soon have appeared that the brig ahead was in fact approaching them from an opposite course close hauled on the

wind, notwithstanding the white light, and thus the collision might have been avoided. It was also the duty of the schooner, having the wind abaft the beam, to keep away. It seems clear that, if the Miranda had had a competent watch at the time, and kept away as she ought to have done, no collision would have taken place. The loss that was sustained was not the result altogether of the neglect of the brig to show the right light, and was not the consequence alone of that neglect, but to say the least it was occasioned in a measure by the neglect of those in the Miranda. I find, therefore, that the two vessels were each in fault.

But it is urged, conceding there was a fault on the part of the Miranda, yet it was not such an omission as that of the brig. The latter had violated an express law, by neglecting to do that the omission of which no circumstances could excuse, and it is not like other rules, which vary according to contingencies. I cannot yield my assent to this doctrine. The law of Congress under particular circumstances requires a particular light. The maritime law requires a vessel under certain circumstances, to be managed in a certain way. Both are equally binding upon those who have the charge of vessels. And I think that is a sound rule, which, if sustained and enforced by the courts, conduces, to the greatest extent, to unremitting vigilance on the part of seamen. The doctrine laid down by Dr. Lushington in the case of *The Hope*, 1 W. Robinson's R. 154, seems to be founded in good sense, and may be applied to this case: that if the brig carried the wrong light, and the master of the Miranda should say, "we will keep our course nevertheless," he would be to blame. It would be a dangerous doctrine, to authorize the master of the Miranda to say under the circumstances of this case: "That vessel has the wrong light; I will not trouble myself to avoid her; the consequences be upon herself."

Both vessels then being in fault, the next inquiry is how is the loss to be apportioned?

The rule laid down by Lord STOWELL in the case of *The Woodrop Sims*, under his second possibility by which a collision may occur, when both parties were to blame, or where there is a want of due diligence on both sides, is, that the loss must be apportioned equally between them as being occasioned by the fault of

both. This seems to be the well settled doctrine in the English admiralty, and is the general rule of the maritime law. Story on Bailment, § 608, and Abbott on Shipping, 230-3, part 3, chap. 1, Shee's Edition; Conkling's Admiralty, 300. It has, however, been said in the argument, that the rule has never been adopted in this country. No case was cited in which the doctrine has been applied by a court of admiralty in this country, and it is certainly singular, in the many cases which have arisen, there are so few in which the fault has been found to be common to both parties, so as to determine what the rule is in such cases. But the doctrine to divide the loss appears to have been approved, and whenever it is referred to, it seems to be considered as a part of the maritime law to be administered by our admiralty courts. Story on Bailment, *ubi supra*; 3 Kent Com. 231, 232. It is treated as settled law by Judge HOPKINSON in *Reeves v. The Constitution*, Gilpin's R. 584, by Judge MCKINLEY in *Strout v. Foster*, 1 Howard's R. 92, and by Judge WOODBURY in his separate opinion in *Clark v. Waring*, 5 Howard, 503. And it was expressly decided and applied by the District Court of Massachusetts in 1846, and treated as the settled doctrine in admiralty, *Rogers v. The Brig Rival*, 5 Law Reporter, 28, and authorities there cited. And see the case of the *De Kock v. —*, Law Reporter, 611.

It is admitted that the rule in the common law courts is different, but all the text writers and judges who have mentioned the subject, seem to regard it as a fixed rule in admiralty. And on the whole, though it has sometimes been considered objectionable by able judges and writers, yet after some reflection I am satisfied the strength of the argument, reasoning upon general principles, is in favor of the rule, and sustains the authorities, in spite of a sneer that has occasionally been thrown out of its being *rusticum judicium*. It is safer to adopt this rule in cases of collision, than it is to measure out to each party in a particular case, the precise quantum of damage that he may have sustained.(1)

(1) The rule has since been sanctioned by the Supreme Court. *The Schooner Catharine v. Dickinson*, 17 Howard's R. 170.

236 DISTRICT COURT OF THE UNITED STATES.

The Arctic and The M. Dousman.

As the parties wish me to decide the question of damages on the proof now in, without referring it to a commissioner, I will state my views on the subject.

The evidence is that the S. F. Gale was injured to the amount of \$336, for which repairs were actually made, and about that amount paid. The other damage is stated by the captain at \$300. One of the witnesses puts it from \$300 to \$500. They do not give all the particulars of the injury, from which the court might ascertain with accuracy the amount. It is stated that the new foresail was worth \$40 more than the old. On the whole I have thought that \$600 would, under the proof, be a fair amount to fix upon as the damage sustained by the S. F. Gale. The witnesses say that the damage done to the Miranda was \$300. The whole damage done by the collision was then \$900, one-half of which would be \$450. The S. F. Gale being injured \$300 more than the Miranda, I shall order a decree to be entered against the claimant and his sureties for \$150, and that divides the loss equally between the parties.

I shall allow costs to neither party ; each one must therefore pay his own.

**E. B. & S. WARD and T. G. BUTLIN, Owners of the STEAMBOAT
ARCTIC v. THE SCHOONER M. DOUSMAN.**

*District Court of the United States. District of Illinois. In
Admiralty.*

HON. T. DRUMMOND, JUDGE.

1. In a collision which took place between a steamer and a schooner as they were entering the harbor of Chicago, the evidence shows that the schooner was ahead, and was sailing the channel usually taken by vessels when the wind was as at that time, and that the steamer attempted to pass, in a narrow space, between the schooner and the pier, without any considerable abatement of speed. This was a fault, and under the circumstances the steamer cannot maintain a libel for the injury done by the collision. The steamer should have allowed the schooner to continue her course without interruption, and if necessary should have stopped.
2. When it appears in a case of collision, one party is in fault, before a court of admiralty will allow any compensation by apportionment or otherwise to such

The Arctic and The M. Dousman.

party, the evidence must clearly show there was a fault on the other side. If it is conflicting, so as to leave it doubtful, or if it should appear that there might be some slight mistake or error which was occasioned by the original flagrant fault of the first named, no apportionment will be made.

3. Whenever a sail vessel is entering upon difficult navigation, as approaching a harbor, &c., a steamer following should take extreme precaution to keep out of the way. A steamer is considered under command, and should avoid sail vessels; and this rule is to be enforced with peculiar strictness under the circumstances of this case.

H. G. & E. S. Shumway, for libellant.

Mr. Goodrich, for claimant.

DRUMMOND, J.—This is a libel filed by the owners of the steamer *Arctic*. It alleges that the steamer, being about to enter the harbor of Chicago, on the 13th day of August, 1851, turned to pass around the north pier: that after the steamer commenced turning, the schooner *M. Dousman*, which was entering the harbor at the same time, with the wind free, and being on the easterly side of the steamer, negligently and improperly changed her course, struck the steamer on the larboard side and damaged her to a considerable amount. It states that there was sufficient room and depth of water for the schooner to enter the harbor without changing her course northerly, and that with proper care on the part of the schooner the collision might have been avoided: that the steamer was so situated at the time the schooner approached, it was impossible for her to get out of the way: the steamer being between the schooner and the north pier. The owners of the *Arctic* claim compensation for the damage done by this collision.

The answer states that the schooner, loaded and drawing eight feet of water, with the wind north, was entering the harbor in the channel usually taken by vessels with such a wind; that at the mouth of the harbor, and south of the channel the vessel was sailing, there is shoal water—usually called the middle ground—on which the schooner would have been in danger of grounding and of being lost or injured, if she had kept too far south: that the *Arctic*, just after the *M. Dousman* had doubled the north pier, undertook to pass between the schooner and the pier: that in so doing she came in contact with the schooner

The Arctic and The M. Dousman.

and did some damage to the latter. The owner denies that the schooner changed her course more than was prudent to keep her off the middle ground, and that there was not sufficient room for the Arctic to pass between the schooner and the pier; and avers that the steamer ought to have stopped or backed so as to allow the schooner to pass into the harbor.

There is the usual conflict of testimony in this case. In a collision between two vessels, there is generally an effort by those on board of one to cast the blame on the other. There are, however, some main facts in this case which cannot be controverted. The *M. Dousman* was a schooner under sail, with the wind about north, trying to make the harbor of Chicago by the north channel. The entrance to the harbor is quite narrow. At the time the schooner changed her course to run into the harbor, the Arctic was several hundred yards astern of the schooner. As the wind was then, vessels coming in by the north channel keep as near the north pier as they can with safety, on account of the current which sweeps around the pier. The Arctic, astern of the schooner, and herself about to make the harbor under a full head of steam, undertook to go to windward of the schooner, and between her and the north pier. Those who had the management of the steamer knew, or were bound to know, the risk they run in attempting so very difficult and delicate a maneuver.

When we come to the details of the collision, we find great discrepancy in the evidence. According to those on the Arctic, no collision would have taken place if the schooner had not suddenly changed her course and luffed up across the line of the steamer, while according to those on the schooner the collision could not have been avoided, and whatever change of course there was, was caused by a fear of striking the middle ground, a bad shoal lying near the mouth of the harbor. It seems that the helmsman of the schooner, when he saw the approach of the Arctic and the danger of a collision, kept the schooner away without any direction to that effect, whereupon the captain ordered him to keep the vessel straight and not mind the steamer. The people of the *M. Dousman* concur in saying that the vessel luffed to avoid grounding. Those on the Arctic, on

the contrary, affirm there was plenty of room with good water to the southward of the course of the vessel.

It is true that the schooner cannot escape the consequences of its own fault by showing that the steamer was also in fault, but I do not think it necessary to weigh and examine the testimony very minutely to determine whether there might not have been some trifling fault on the part of the schooner, because the faults of the steamer were so many and flagrant, that whatever error, if any, of the schooner there was (and I am not prepared in this conflict of testimony to say there was any), it might well be considered, under the circumstances, as trivial.

I think the weight of the evidence is, that the collision occurred as the Arctic was in the act of swinging as she changed her course to enter the harbor. All the witnesses on the schooner do not agree as to this; but the master of the brig Mary, which was a short distance behind, and about to enter the port, speaks particularly on this point, and his position gave him the best opportunity of judging. Besides, this conclusion is strengthened by the manner of the contact, and by the nature of the injury that was done to the steamer and to the schooner. The luffing up of the schooner may have contributed slightly to it, but it is not certain that the collision would not have taken place in any event. It would not be surprising if the helmsman of the schooner was a little alarmed when he saw the imminence of the danger, and should try to avoid it; nor that the captain, through an apprehension of running aground, should give an order to luff. These are niceties which need not be severely criticised. We must recollect that the captain of the schooner had a right to presume that the steamer would keep out of his way; and though we should hold him to the exercise of all reasonable skill and prudence, still we must judge of these by the light of the circumstances which surrounded him.

The first and second mate of the Arctic unite in giving it as their opinion that the checking bell was not rung, and that her speed, which had been from eight to twelve miles an hour, had not been slackened. It is true one of the men says that the checking bell was rung fifteen minutes before the collision; and yet this same witness declares, in another part of his testimony,

that at that time they were only seventy or eighty feet from the pier. No reliance whatever can be placed on the evidence of this witness. He was examined before me, and his whole manner indicated a total recklessness as to the facts, and his eagerness to screen the Arctic, involved him in endless contradictions. It is manifest that the Arctic, whether her speed had been lessened or not, was going at too rapid a rate. It would be attended with very ruinous consequences to sanction such speed under such circumstances. Coming into a harbor with a narrow passage, right in the wake of another vessel, at a speed of ten miles an hour! Steamers cannot be too stringently held to caution and circumspection in this particular. They are constantly violating all the rules we adopt, and I do not feel disposed to relax those wholesome restraints which the courts have thrown around their management.

The schooner was ahead, and had the right to choose her course; in this instance, with the wind north, it was her only course. It was the duty of the steamer to keep out of the way of the schooner; and there can be no doubt it was a gross fault for the steamer to attempt, under the circumstances, to pass between the schooner and the north pier. This is the opinion of the nautical witness who has been examined on that point, and I concur fully in its correctness. It was attended with great risk and peril in every aspect, as well to the steamer as to the schooner.

I think it may be laid down as the rule, without exception, that whenever a sail vessel is entering a harbor so difficult of access as that of Chicago, a steamer following should take extreme precaution to keep out of the way of such vessel, and, if need be, stop entirely. It is the only safe rule. The general rule applicable to steamers is, that they are always considered under command, and should keep out of the way of sailing vessels; and it seems to me this rule should be enforced with peculiar strictness upon a steamer situated as the Arctic was in this case.

If this were a libel promoted by the owners of the M. Dousman, I should have no hesitation in awarding to them compensation for the damage their vessel sustained; as it is, I dismiss the libel with costs.

DISTRICT OF MISSOURI.

DECISIONS

OF THE

HON. R. W. WELLS JUDGE.

THE UNITED STATES v. THE STEAMBOAT JAMES MORRISON.

District Court of the United States. District of Missouri. In Admiralty.

HON. R. W. WELLS, JUDGE.

1. The act of Congress, approved July 7th, 1838, "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," is founded upon article 1, section 8, clause 3 of the constitution, giving Congress power "to regulate commerce with foreign nations, and among the several states," &c.
2. If commerce is completely internal, confined to one state, Congress has no power over it.
3. Congress has no authority to require a license to carry on a ferry over the Missouri river, at a place entirely within the limits of the state of Missouri.
4. There is no law previous to the act of July 7th, 1838, requiring a ferry boat plying wholly within the limits of a state, to obtain a license.
5. The act of 7th of July, 1838, does not apply to such ferry boats.
6. Whether ferry boats plying between the United States and Canada, would be required to obtain a license. *Quere?*
7. The phrase "coasting trade," cannot be applied to ferrying across a river.

B. F. Hickman, for the United States.

S. M. Bay, for steamboat James Morrison.

WELLS, J.—This is a case of libel. It is founded on the second section of the act of Congress, entitled "An act to provide

for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam;" approved 7th July, 1838. The libel states substantially, that the boat was propelled by steam, and was employed in navigating the Missouri river, a navigable river of the United States, and in transporting goods, wares and merchandise, and passengers in said boat on said river, without the owners having obtained a license from the proper officer of the United States so to do, and charges that said boat was liable to a penalty of \$500.

The owners appeared and defended. The answer admits that the boat was propelled by steam, that it navigated the Missouri river, as charged, but denied that it navigated or transported freight and passengers in any other manner than as a ferry boat across said river at St. Charles, altogether within the limits of the state of Missouri, for which purpose they had a license under the laws of the state of Missouri. They admit that they had no license from the United States; but deny that one was necessary, or that they incurred any penalty. From the evidence and the admission of the parties, it appears that the facts of the case were correctly stated in the answer.

Upon this state of facts an important question arises for the consideration and determination of the court. Is a steamboat employed only as a ferry boat, altogether within the limits of a state, liable to a penalty for being thus employed, not having a license from the United States officer, under the provisions of the act of 7th of July, 1838?

The first and second sections of that act are as follows:

"Section 1. That it shall be the duty of all owners of steamboats or vessels propelled in whole or in part by steam, on or before the first day of October, 1838, to make a new enrollment of the same under the existing laws of the United States, and to take out from the collector or surveyor of the port, as the case may be, where such vessel is enrolled, a new license, under such conditions as are now imposed by law, and as shall be imposed by this act.

"Section 2. That it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares and merchandise or passen-

The Steamboat James Morrison.

gers in or upon the bays, lakes, rivers, or other navigable waters of the United States, from and after the first day of October, 1838, without having first obtained from the proper officer a license, under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and shall be seized and proceeded against, summarily, by way of libel, in any district court of the United States having jurisdiction of the offence."

The words of the act are comprehensive enough to include the case of this boat. It is propelled by steam, navigates a navigable river of the United States, transports goods, wares and merchandise and passengers upon said river, and has no license therefor from the proper United States officer.

It is not uncommon for a case to come within the words of an act, yet not come within the meaning of the act. It will be observed that the first section requires a "new enrollment" under the existing laws of the United States, and a new license taken out. The second section requires a license to be taken out under the existing laws. No license is spoken of, mentioned or described, other than that required theretofore. It is obvious that the license spoken of in the act is that prescribed by other and former laws of the United States, and could only be "a license to carry on the coasting trade," no other license known to the laws of the United States being at all applicable. This was admitted by the district attorney of the United States in the argument at the bar.

I will first inquire into the constitutional power of Congress to require a license in this case, and then, secondly, to inquire whether, supposing the power to exist, it has been extended by the act of 1838 to this case. Even if we were to confine our inquiries to the second branch of the subject, it would greatly aid us in making those inquiries to ascertain the power of Congress over the subject.

It is said in Sergeant's Constitutional Law, page 808, that "the

general power of establishing regulations for the condemnation of vessels as unfit for sea or unworthy of repair, may, it would seem, be exercised by Congress, either as applicable to trade and commerce, or as within the admiralty jurisdiction." And the Supreme Court of the United States in the case of *Janney v. The Columbia Ins. Co.*, 10 Wheat. 418, said something, *arguendo*, to the same effect. The admiralty jurisdiction is a part of the jurisdiction of the courts, and is found in the third article, section second, of the constitution of the United States: "The judicial power shall extend to all cases of admiralty and maritime jurisdiction." But the Supreme Court decided in the case of *the United States v. Combs*, 12 Pet. R. 76, that "in cases dependent on the locality of acts done, this power is limited to the sea and to tide-waters as far as the tide flows, and does not reach beyond high-water mark." Of course that jurisdiction could not reach a transaction the locality of which was some thousands of miles above tide-water; for in this case the jurisdiction would depend upon the locality of the transaction.

But the provisions of the act of 1838 are evidently founded on the power of Congress to "regulate commerce." The license required is "to carry on the coasting trade," and the power was claimed, in the argument at the bar, under the clause "to regulate commerce." It was not claimed under the admiralty and maritime jurisdiction.

The constitution, in article 1, section 8, clause 3, declares that Congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The authority of Congress, as it regards the case at bar, is claimed under the power to regulate "commerce among the several states."

The power over navigation and intercourse is part of the power to regulate commerce, and is possessed by Congress as fully as it possesses the power to regulate commerce; but, of course, not to a greater extent. There is no separate and distinct grant to regulate navigation or intercourse; they are incidents to or part of the power to regulate commerce. Wherever the right to regulate commerce does not extend, the right to regulate navigation or intercourse does not go. The latter goes

with the former or follows it. The right to regulate commerce only extends to three descriptions of commerce: First, with foreign nations; second, among the several states; third, with the Indian tribes. It does not include the perfectly internal commerce of a state. The commerce to be subject to such regulations must be among, that is intermingled with, the several states. If confined to one state alone, Congress has no power over it. It would have been strange if it was intended that Congress should have power to regulate every description of commerce, to enumerate only particular kinds in the grant. And such are the doctrines and opinions of the Supreme Court. In *Gibbons v. Ogden*, 9 Wheat. R. 194, that court says: "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary." Again: "Comprehensive as the word 'among' is, it may be properly restrained to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely internal traffic of a state, because it is not an apt phrase for that purpose, and enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description." 9 Wheat. Rep. 194, 195.

Again: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally." Ibid, 195. Again: "The completely internal commerce of a state, then, may be considered as reserved for the state itself." Ibid, 195.

This, also, is the doctrine maintained by the highest court of the state of New York. See *Steamboat Company v. Livingston*, 3 Cowen's Rep. 754.

Is the right of Congress to regulate navigation more extensive than the right to regulate commerce? Does it extend to the regulation of navigation, which is not connected with "com-

merce with foreign nations, among the several states, and with the Indian tribes?"

The Supreme Court of the United States in *Gibbons v. Ogden*, said, "a power to regulate navigation is as expressly granted as if that term had been added to the word commerce." This sentence was commented on in the argument at the bar, as if the Supreme Court intended thereby to convey the idea, that Congress had the right to regulate navigation in all cases. It could not have an application so extensive, because, if navigation be comprehended in the word commerce, it is limited with the limitations on that word; but suppose we add the word "navigation" to the word "commerce," as the court supposes may be done, it will then read, "Congress shall have power to regulate commerce and navigation with foreign nations, and among the several states, and with the Indian tribes." So we see that still, Congress could only regulate navigation, when it could regulate commerce, that is, as it regards this case, "among the several states." And, indeed, it is clear that the Supreme Court must have intended to convey this idea; for in another part of the same opinion, it says: "The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes.'" And in the case of the *United States v. Combs*, 12 Pet. 78, that court says: "The power to regulate commerce includes the power to regulate navigation as connected with the commerce with foreign nations and among the several states."

The next matter of inquiry will be, what is that commerce or navigation, which is completely internal or within the limits of a state. To make a particular branch of commerce or trade within a state, a part of the commerce among the several states, it would not be sufficient that it was remotely connected with that commerce among the several states; for almost everything and every occupation and employment in life are remotely connected with that commerce or navigation. And if Congress has the right to regulate every employment or pursuit thus remotely connected with that commerce, of which they have the control, then it has the right to regulate nearly the entire busi-

ness and employment of the citizens of the several states. Thus the cultivation and preparing of hemp, tobacco, cotton, rice, grain, &c., finding and preparing minerals, the manufacturing and retailing of goods, are all connected with "commerce with foreign nations, among the several states, or with the Indian tribes;" because they are the food of that commerce, without which, it would soon dwindle into insignificance, if it did not altogether perish. Yet, if Congress has the power to regulate all these employments, and a thousand others equally connected with that commerce, then it can regulate nearly all the concerns of life, and nearly all the employments of the citizens of the several states; and the state governments might as well be abolished. It is not sufficient, then, that navigation, or trade, or business of any kind, within a state, be remotely connected, or, perhaps, connected at all with "commerce with foreign nations, or among the several states, or with the Indian tribes," it should be a part of that commerce, to authorize Congress to regulate it.

The "coasting trade" is a part of the commerce among the several states; and it is not the less a part of that commerce, because the vessel navigates only from port to port, in the same state, up and down a navigable river of the United States, and never goes beyond the state boundary. This will appear more plain upon looking at the course of trade in the United States, upon its great navigable rivers. Goods are purchased at Philadelphia, are brought to Pittsburgh and there shipped. These goods come from parts beyond seas, or were manufactured in the United States, and were intended for sale in Mexico, or at Independence or other place in this state. But the boat in which they are shipped only goes as far as St. Louis. There the goods are reshipped on boats more suitable for the Missouri, and are, in that boat, conveyed to Independence. There they are landed and taken in wagons (if intended for Mexico), across the prairies to that country. If intended for the valley of the Osage, they are landed at the mouth of that river, and reshipped on boats more suitable to its navigation than those ordinarily navigating the Missouri. The same observations may be made in regard to goods, or southern produce from New Orleans. Very few boats engaged in the trade between that place and St. Louis, ascend

the Missouri, and very few that ascend the Missouri ascend the Osage river. These remarks will also apply to nearly all the navigation of the valley of the Mississippi, and will apply as well to boats that carry off the produce of the country, as those which bring merchandise. The boats that navigate the Missouri and Osage rivers, seldom go beyond the limits of the state of Missouri; and yet they are as much and as altogether employed in commerce and navigation among the several states, as if they made voyages beyond the limits of the state. The circumstance that several boats are employed, some without and some altogether within a state, does not make it the less "commerce" among the several states, or less "commerce with foreign nations," or in many cases, "with the Indian tribes." The commerce is a whole, parts of which are in several states. If Congress cannot regulate it in one state, it cannot, for the same reason regulate it in another state. And thus it could not be regulated by Congress at all, although it is undeniably commerce among the several states. And, in my opinion, it would be the destruction of this commerce, if each state in the Union through which it passed, had the right to license vessels employed in carrying it on, and to exclude all except those thus licensed, merely because those vessels did not navigate beyond the limits of the state granting the license.

In *Gibbons v. Ogden*, the Supreme Court says: "Commerce among the several states" cannot stop at the boundary line of each state. But, although commerce with foreign nations, among the several states, and with the Indian tribes, will include commerce and navigation up and down the navigable rivers of the United States, as part of the coasting trade, yet there is, undoubtedly, a description of commerce and navigation, that is altogether and completely internal, which belongs exclusively to the states, respectively; and which Congress has no right to regulate. In the case of *Gibbons v. Ogden*, the Supreme Court says: "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states." Again, comprehensive as the word "among" is, it may

properly be restricted to that commerce which concerns more states than one. The court of last resort, in New York, laid down the same principles, as will be presently seen. *Steamboat Co. v. Livingston*, 3 Cow. R. 743.

The next matter of inquiry will be, is a boat employed only in ferrying across the Missouri river, altogether within the limits of the state of Missouri, engaged in commerce or navigation, the instrument of commerce with foreign nations, among the several states, or with the Indian tribes? If this be answered in the negative, then Congress has no right to regulate any commerce or navigation it may be employed in, or to require it to take out a license therefor; and this will be so, although the boat does in some sense navigate the Missouri, a navigable river in the United States. It is not supposed that a boat so employed is engaged in commerce with foreign nations or with Indian tribes. Is it, then, engaged in carrying on commerce among the several states? Is it engaged in carrying on any commerce at all? Is the navigation in which it is engaged an instrument to carry on commerce among the several states? It neither passes up or down the river, and may navigate a year without being twenty feet higher up or lower down, at any time, unless by accident or against the will of the master or owner, than it was at the beginning. Its navigation is neither the beginning, middle or end, or any part of the coasting trade, or any other "commerce among the states." No part of its employment is any part or any link in a chain of "commerce among the several states." Its employment has no other than a remote connection with "commerce or navigation among the several states;" no more connection than has the farmer who cultivates hemp, tobacco or cotton for a market in other states—the miner who digs and smelts lead—the manufacturer who manufactures for the same market, or the traveler who intends purchasing any of these articles. The employment of such boat may be connected with commerce or navigation "among the several states," as indeed is almost every business and avocation in life, more or less remotely; but it is no part of such commerce or such navigation. If it be any part of any commerce, it is that commerce which is altogether internal, as it regards the state of Missouri and other states.

Its navigation is wholly disconnected with any other navigation, and is wholly within the state. If the commerce or navigation in which it is employed, be not wholly internal—if, indeed, it be engaged in any commerce—then I am unable even to conjecture or imagine any description of commerce or navigation which is so. This was the opinion of a majority of the Supreme Court of the United States, all the court except Mr. Justice JOHNSON, who, perhaps, dissented, in the case of *Gibbons v. Ogden*, above referred to. The opinion was, however, only given *arguendo*; it not being a matter necessary to be decided in the cause. The court (page 203), speaking more particularly of the state inspection laws, says: "They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c., are component parts of this mass." The doctrine thus laid down by the Supreme Court, is mentioned and approved both by Kent and Story; at least they do not in any way controvert or dissent from it. 2 Story Com. 515, and 1 Kent Com. 437.

The same opinion is also advanced and enforced by the court for the trial of impeachments and the correction of errors in the state of New York, in the case of *The Steamboat Co. v. Livingston*, 3 Cow. R. 754. That court says: "The Supreme Court of the United States expressly disavows any authority in Congress to interfere with the purely internal commerce and police of a state. Ferries may be subject to the acts of Congress so far as they are used for carrying on the coasting trade, but those ferries which are the subject of state grant, if they can be called commercial regulations at all, belong clearly to the internal commerce of the state." Again: "Those ferries over which the state exercises its appropriate authority, are not connected with the coasting trade; they are not, in the constitutional sense, commercial regulations. But if they were, they belong to that exclusively internal commerce over which Congress has no con-

trol." It was said in the argument of the above case, that the state might establish a ferry between the cities of New York and Albany; and it was in answer, I presume, to that part of the argument that the court said: "Ferries may be subject to the acts of Congress so far as they are used for carrying on the coasting trade." But the court said further, that to call such navigation a "ferry," would be an abuse of the term.

As Congress has the power to regulate commerce, when carried on by land as well as when carried on by water—carried on roads as well as on rivers—I will not say that it might not regulate some description of ferries, such as those between the United States and Canada, and perhaps others. But this, I think, has not been done. A ferry is nothing more than the continuation of a road, and as far as regards the authority of the state and general governments, does not differ from a toll bridge. And until it is made to appear that Congress has the power to regulate the traveling on the ordinary roads of the state, and to license toll bridges, it would seem to me it could not regulate and license the ordinary ferries on those roads. For each state to regulate and license the coasting trade and exclude and admit what vessels it pleased within its limits, would be, and has been—as was seen in the controversy between New York, New Jersey, and Connecticut, in regard to the exclusive privileges granted to Livingston and Fulton by the former state—extremely inconvenient and dangerous. But for each state to regulate its ferries, has not produced and cannot, I should think, produce any inconvenience to the citizens of other states. It may be, that steam ferry boats should be regulated as directed in the act of 1838, in regard to vessels engaged in the coasting trade; but if so, the states are perfectly competent to make all such regulations and to see to their enforcement.

It was said in the argument of this cause that a license from the United States and one from the state were both necessary; that a license from the United States gave the right to navigate the river, and that from the state to land and take in passengers and freight and carry on a ferry. In the case of *Gibbons v. Ogden*, the Supreme Court said: "The word 'license' means permission or authority; and a 'licensee' to do any particular thing,

is a permission or authority to do that thing, and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license." The decree in that case is, "That the license to carry on the coasting trade gave full authority to navigate the waters of the United States by steam or otherwise for the purpose of carrying on the coasting trade, any law of the state of New York to the contrary notwithstanding." Now, if carrying on a ferry is carrying on the coasting trade, a license from the United States to carry on that trade, will give the right to carry on the ferry. And of course any license from the state of Missouri would be altogether inoperative, for it could only authorize the grantee to do that which he was already authorized to do by a license from the United States; and a license from the state would be inoperative for another reason, that is that the state had no authority over the coasting trade. And that the state has no control over that trade will be seen by looking at the decision of the court in the case of *Gibbons v. Ogden*, before cited, pages 198, 200. If, on the contrary, the carrying on a ferry be not carrying on the coasting trade, then the United States have nothing to do with it, and the license from the state would give the authority to carry on the ferry; and of course, a license from the United States would be inoperative. So that, in no point of view, can both licenses be operative. A license to ferry, is a license to cross at a certain place, carrying freight and passengers; and if it does not give that right, it gives nothing; if it does give that right, no other license can be necessary. What would avail the right to land and take in freight and passengers, as a ferry, without the right to cross over and reland? And of what avail would be a license from the United States to navigate the river, without also the right to land. Neither the United States nor the state ever grants such useless and inoperative privileges, and no constitution can require it. What is the reason that to run a boat between Independence and St. Louis no license from the state is necessary or ever granted; and yet, to cross a river, as a ferry boat, such license is necessary and has always been required?

The reason is, that one is part of the coasting trade, and the other is not. It was admitted in the argument, that such license was necessary in the one case and unnecessary in the other.

It was also said in the argument, that perhaps this power in Congress may be supported under the grant, in the constitution, to lay and collect taxes. The answer may be brief. No tax is collected or collectable under the laws of the United States applicable to this case, and the act of 1838 is to prescribe and impose certain regulations, not to lay or collect a tax.

I come, therefore, to this conclusion, that Congress has no authority to require a license to carry on a ferry over the Missouri river, at a place altogether within the limits of the state of Missouri.

The next matter of inquiry will be, is there anything in the laws of the United States, previous to the act of 1838, which requires a boat employed only in ferrying across a river, at a place wholly within the limits of a state, to obtain a license for such employment? A person will be greatly aided in the investigation, by bearing in mind the constitutional power of Congress. For if words or phrases in an act, will bear a construction which is in accordance with the constitutional power of the legislature, and one which is opposed to that power, we are bound to believe, that the legislature intended that construction which is in accordance with their power. The title of the act, which is the principal one on this subject (18th Feb. 1793), is "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The form of the license, given in the act itself, is "license is hereby granted for the said — called the said —, to be employed in carrying on the coasting trade." The act provides for the forfeiture of any ship or vessel, found trading between, &c., laden with foreign goods; and for the payment of custom duties, if laden with certain goods, &c., not being registered or licensed for carrying on the coasting trade. The coast is the shore. "To coast" is to navigate along the shore. The "coasting trade," is the trade along the shore. It cannot with any propriety be applied to ferrying across a river; and never, I think, has been so applied.. Neither the

phrase "coasting trade," nor the word "coasting," nor "trade," could with any propriety, be applied to a ferry across a river. Congress may, and probably has the power, to apply its laws to some description of ferries, such as those between Canada and the United States, and probably others; but I am of opinion, that none of the acts of which we are now speaking, were intended to apply to the ordinary ferries within the limits of a state.

The opinion of Mr. Justice JOHNSON, in (the case of) *Gibbons v. Ogden*, was cited by the counsel for the United States, in the argument of this case. When properly considered, there is not, I think, much in it that favors the doctrine maintained by the counsel. It had been said, in the argument of that case, that the boat which plied between New York and Albany, was only a ferry boat. Mr. J. JOHNSON, in noticing that part of the argument, said that in either character—that is, as a steamboat or a ferry boat—she was expressly recognized as an object of the provisions which relate to licenses. This was certainly correct, for in either character, or by whatever name she was called, she was engaged in "carrying on the coasting trade." It only now remains to say a few words in regard to the act of 1838. It was admitted by the United States counsel, in the argument of this cause, that the license required to be taken out, by that act, was a license to "carry on the coasting trade," and was no other than that required by the laws of the United States existing theretofore. This indeed, is evident from the provisions of the 1st and 2d sections. The 1st section requires a new enrollment, a new license; the 2d section, a license "under the existing laws." If, then, a vessel be neither engaged in the coasting trade, or indeed in any trade at all, the clearest and strongest language would be necessary to require such a vessel to take out a license for such purpose. We have seen that a license is an authority or permission to carry on that trade; if it be not intended to employ a vessel in that trade, why should the owner be required by law to take out a license therefor? If the law will bear no other construction than one so unreasonable, we would be bound to suppose it was intended to have that construction; but it will bear another construction, and that is, that it was intended that

vessels engaged in the coasting trade should be required to conform to additional regulations, before being allowed to carry it on. The 1st section requires boats "to make a new enrollment, and take out a new license, under such conditions as are now imposed by law, and as shall be imposed by this act." There is not a word in the act of 1838 which applies particularly to ferry boats, and not one but will apply generally to vessels engaged in the coasting trade. I infer, therefore, that it was not intended to make any such extraordinary change in the existing laws. If such a change were contemplated, many details would be necessary to confine its operation to cases within the jurisdiction of the general government. As was said by the Supreme Court, in *Gibbons v. Ogden*, in regard to the power, "it would be inconvenient, and certainly is unnecessary." Ferry boats would have to quit their station, twice a year, and go frequently several hundred miles to be inspected and licensed; a trip for which they are unfit, and which would make other boats necessary to supply their places at the ferries, creating an expense which but few ferries would justify. It would abolish all the laws of the state in regard to such ferries, and materially interfere with its police, economy and revenue. Such important changes are not usually made by mere implication or construction, and no court would, I think, be justifiable in giving the laws in this case such an interpretation. My opinion is, therefore, that the act of 1838 does not apply to the steam ferry boat, the James Morrison.

NOTE.—This case was taken to the Circuit Court of the United States on appeal, and the judgment of the District Court affirmed. A more extended reference is made to the opinion of the learned judge of the Circuit Court, on appeal, in the case of *The United States v. The Steam Ferry Boat Wm. Pope*, hereinafter reported.

256 DISTRICT COURT OF THE UNITED STATES.

Steam Ferry Boat Wm. Pope.

THE UNITED STATES *v.* THE STEAM FERRY BOAT WM. POPE.

District Court of the United States. District of Missouri. In Admiralty.

HON. R. W. WELLS, JUDGE.

1. The act of July 7th, 1838, "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," was not intended by Congress to apply to all steamboats, but only to such as before the passage of that act were required to be enrolled and licensed for the coasting trade.
2. Under the laws of Congress enacted prior to that of 1838, ferry boats were not required to be enrolled and licensed.
3. The words, "coasting trade," mean, the trade along the shore, and the business of a ferry boat is not included therein.
4. A license from the United States, and a license from a state, are not both necessary to authorize the owners of a steamboat to employ her in ferrying.
5. The laws of the United States contain no regulations for ferries as such, while the states have exercised the right to license and regulate ferries from the commencement of the government to this day.

John D. Cook, Dist. Atty., and *Lyman D. Norris*, for United States and informers.

Benjamin F. Hickman, for owners of boat.

WELLS, J.—A libel was filed against the Wm. Pope for a violation of the act of Congress, approved 7th July, 1838, to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam.

The particular violation of the act charged in the libel, was navigating the Mississippi and transporting goods, wares and merchandise, &c., without first obtaining a license therefor, as provided in the second section of said act.

The answer of the owners admitted that no license had been obtained from the United States, denied that any was necessary, and alleged, as their defence, that the boat was employed no otherwise than as a ferry boat across the river at St. Louis, un-

der proper licenses, obtained from the state authorities of Illinois and Missouri.

To the answer, the district attorney filed a demurrer; and the case was submitted on bill, answer and demurrer. This court held, in the case of the *United States v. The Steam Ferry Boat James Morrison*, ante, page 241, that the act of 1838, above cited, did not apply to ferry boats. The opinion in that case was published; the case was taken, by appeal, to the Circuit Court; and the decree of the District Court was affirmed. In delivering the opinion of the Circuit Court, the learned judge said that he affirmed the judgment, and altogether concurred in the opinion delivered by the District Court; and that three of the judges of the Supreme Court had made, in their respective circuits, similar decisions, in cases, too, which were ferries over waters separating states. It was urged by the district attorney, in the argument of this case, that the act of 18th February, 1793, for enrolling and licensing ships or vessels to be employed in the coasting trade, &c., required licenses to be obtained only by vessels to be employed in the coasting trade or fisheries; but in regard to steamboats, the act of 1838 went further, and required licenses to be obtained by all steamboats, over twenty tons burden, navigating the waters of the United States, whether employed in the coasting trade, or in any other business, saying at the same time, that he did not controvert the decision in the case of the *James Morrison*, which was a steamboat employed in ferrying wholly within the limits of the state.

I think I might rest this case upon the argument contained in the opinion in the *Morrison* case; and upon the authority above mentioned; but I will give, briefly, my views upon the point made by the district attorney, in addition to what is said in that case.

Does the act of 1838 require licenses to be obtained by all steamboats over twenty tons burden, employed on the navigable waters of the United States? If this question be answered in the affirmative, then the case of the *Morrison* was erroneously decided; yet the district attorney does not controvert that decision. If a steamboat were employed solely in carrying gravel from the Osage river for the streets of St Louis, or employed

solely in carrying railroad iron from manufactories on the Missouri, or Osage, to other points in the state, there to be laid on our own railroads, it would, if his proposition be true, have to obtain a license from the United States; and yet it is expressly declared by the Supreme Court of the United States, in the case of *Gibbons v. Ogden*, 9 Wheat. Reports, 194, that the completely internal commerce of a state is reserved to the state alone; all that commerce which is wholly within the state, and does not affect other states, or foreign countries, is of that description, and Congress has no right to regulate it. It must be recollected that the power of Congress extends only to the regulation of "commerce with foreign nations, among the several states, and with the Indian tribes." No one will contend that the employment of the steamboat above mentioned could constitute any part of that commerce, the regulation of which is intrusted to Congress. It will also be noticed that there is no separate and distinct grant to Congress of the power to regulate *navigation*. That is claimed as necessarily belonging to the power to regulate *commerce*. If Congress has not the power to regulate the particular commerce, it can have no power to regulate the navigation employed in carrying on that commerce.

The above observations are made to show that the language employed in the act of 1838, should not receive a construction so comprehensive as that contended for; as it would involve a violation of the constitution by Congress, which no court can presume to have been intended.

It is true, that there are words used in the act of 1838, which are comprehensive enough to include all steamboats over twenty tons burden employed on the navigable waters of the United States. Thus it says: "It shall be the duty of all owners of steamboats"—"that it shall not be lawful for the owners, master or captain of any steamboat." But in looking at other parts of the act I think it will be apparent that it was not the intention of Congress to apply the provisions of that act to all steamboats, but only to apply them to such as were before that time required to be licensed as coasting vessels. It provides that these vessels shall make a new enrollment. How could this be, if there had been no old enrollment? And shall obtain a new

license. How could this be if there had been no old license? They shall make a new enrollment under existing laws, referring to the act of 18th February, 1793, for enrolling and licensing ships and vessels, which was the existing law. This new license is to be "under such conditions as are now (then) imposed by law, and as shall be imposed by this act." Again in section second, it provides that it shall not be lawful for the owners, &c., of any steamboats to transport any goods, &c., after the 1st October, 1838, without having first obtained from the proper officer a license under the existing laws, and without having complied with the conditions imposed by this act. These provisions, I think, show that it was not the intention of Congress to require by the act of 1838, any vessels to be enrolled and licensed, except those which were, before that, required to be enrolled and licensed; and that they should be required, before this new license was granted, to conform to the provisions of that act—such as having their hulls and boilers inspected, &c. Under the laws enacted previous to that of 1838, ferry boats were not required to be enrolled and licensed. *Gibbons v. Ogden*, 9 Wheat. 203; 2 Story's Com. 515; 1 Kent's Com. 437; 3 Cowen's Rep. 754.

The license required to be granted by the act of 1838, is a license to carry on "the coasting trade;" such are the licenses now actually granted, and no other. The coast is the shore. To coast is to navigate along the shore. "The coasting trade" is the trade along the shore. How absurd would it be to require a license to carry on the coasting trade, for a vessel that was engaged in no trade at all, and certainly in no coasting trade. A vessel that merely crosses the river as a ferry boat, can in no proper sense be said to be engaged in any trade; nor can it be said to coast or be employed in the coasting trade.

A ferry I deem nothing but a continuation of a road. I admit that Congress might, constitutionally, regulate the transit on roads and over ferries, so far as it is necessary to regulate the "commerce with foreign nations, among the several states, and with the Indian tribes," but no further.

To regulate such transit, a variety of provisions not contained in the act of 1838, or in any other act of Congress, would be

necessary. Congress have not yet undertaken to separate the purely internal trade and intercourse of the people of a state on its roads, from the commerce among the several states. They have not yet undertaken to regulate, either on the roads or over the ferries, the passage of every market man with his chickens and pigs; or a man going to mill or to church, although passing from one state into another state.

The acts of Congress require vessels engaged in the coasting trade, or in parts of the coasting trade, to prepare and exhibit manifests of their cargoes, or of parts of their cargoes, every voyage or trip. This would apply to ferry boats, in some parts of the United States, if they are considered vessels engaged in that trade, and to be licensed under the act of 1838. Some ferry boats cross as often as once in every ten minutes; they would have to inspect the contents of every wagon, and make out a manifest every trip, night and day. If the act of 1838 applies to ferry boats, they would all have to visit St. Louis twice a year to have their hulls or boilers and machinery inspected. Some of these boats would have to go some five hundred miles and back, making a voyage of one thousand miles; some of them would never get back, being unable to stem the current. Whilst they were absent, another set of boats would be required to supply their places, or the ferries be without boats.

A license from the United States and a license from a state cannot both be necessary to do the same thing; they cannot both be necessary to authorize the owners of a steamboat to employ her in ferrying. In the above cited case of *Gibbons v. Ogden*, the Supreme Court says: "The word 'license' means permission or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize." If, then, the United States have authority to grant a license, and under and by virtue of the laws of the United States such license be granted, then any license from the state to do the same thing would be wholly nugatory and inoperative. If the state has authority to grant a license, and does grant one, then a license from the United States would be wholly nugatory and

inoperative. A license conveys the right to do the thing or it conveys no right; if it conveys the right to do the thing, then no other or further conveyance from any person can be necessary. A license from the United States to carry on the coasting trade, it is urged, is necessary for a steam ferry boat. If this be so, then a license from the state would be of no avail, and need not be obtained. The states have exercised the right to license and regulate ferries from the commencement of the government to this day.

The laws of the United States contain no regulations for ferries as such; they provide only for the security of the revenue of the United States, and against explosions of boilers, bad hulls, &c. The laws of the states contain a great number of regulations of ferries, as such, deemed highly essential, if not absolutely necessary, none of which are contained in the laws of the United States; they are also the subjects of taxation by the states. Thus the laws of Missouri provide:

1st. A ferry must be necessary, and not so near as to conflict with another ferry.

2d. The person applying for license must be a suitable person to be intrusted with a ferry.

3d. He must pay the tax—it may amount to \$500.

4th. He must give bond, with sufficient security, conditioned for the faithful performance of his duties.

5th. The rates of ferrying must be fixed, and he is not allowed to exceed them.

6th. He is to keep good and suitable boats, and sufficient hands to attend on all occasions.

7th. He is to give due attendance.

8th. He is made liable for damages.

9th. He is to keep the rates of ferriage posted up at the ferry.

10th. Fines for various acts and omissions are specified, and the manner of collecting them, with a variety of other provisions.

All these provisions are abrogated, if the new doctrine be true, and none made to supply their place. If, as alleged, inspection of hulls and boilers be necessary, the states are competent to require it.

262 DISTRICT COURT OF THE UNITED STATES.

The Steamboat Planter.

Congress has been careful not to encroach upon the jurisdiction or prerogatives of the states; and I think the court is not authorized, from anything in the act of 1838, to say that Congress has made this great inroad into the ancient and hitherto undisputed jurisdiction of the states, and done so by mere implication—there not being one word in the act of 1838 about ferries or ferry boats. For a more full discussion of some points involved in the consideration of this case, I must refer to the opinion delivered in the case of *The James Morrison*, a copy of which is filed herewith.

For the above reasons, the demurrer to the answer is overruled, this libel dismissed, and the bond given by the owners canceled, and a decree for costs against the informers.

THE UNITED STATES v. THE STEAMBOAT PLANTER.

District Court of the United States, District of Missouri. In Admiralty.

HON. R. W. WELLS, JUDGE.

1. The eighth section of the act of 28th of February, 1799, in relation to prosecutions upon a penal statute, by an informer, contemplates an action in the name of the informer alone, as well as in the name of the United States, to the use, in whole or in part, of an informer.
2. If the informer, for whose use the suit is prosecuted, in whole or in part, is not an officer of the United States, the United States cannot be liable for costs in the cases mentioned in the said eighth section.
3. The informer is liable, although the United States may be a party on the record.
4. The court may require an informer to give security for costs, and in case of refusal, strike his name from the record.
5. An enrollment and license, duly executed, does not require delivery to give it validity.
6. Where a license was duly executed, sealed, signed, dated and numbered, but not delivered until a month thereafter; *Held*, that it was a valid license from its date.

The Steamboat Planter.

John D. Cook, Dist. Atty., and *Lyman D. Norris*, for United States and informer.

Benjamin F. Hickman, for owner of boat.

WELLS, J.—A libel was filed against the steamboat Planter for a violation of the act of Congress approved 7th July, 1838, "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." The libel states, that "the attorney of the United States for the said district of Missouri, upon the information on oath of Peter V. Skillman, now here in the name and on behalf of the United States, and on behalf and to the use of the said Peter V. Skillman, gives the court to understand and be informed," &c. An affidavit is filed with the libel by said Skillman, which sets forth that "in the name and on behalf of the United States of America, as well as in the name and on behalf of Peter V. Skillman, who presents to the court here this information, now here giveth the court to understand and be informed," &c. The second section of the above recited act provides that a fine of \$500 shall be paid by the owners of any steam vessel which navigates the rivers, &c., without first obtaining a license therefor, "one-half for the use of the informer."

On filing the libel, no security for costs was given by the informer, and the owners, after filing their answer, moved the court for a rule on the informer to give security for costs. The United States appeared by the district attorney, and the informer by his proctor. The motion was opposed by the proctor of the informer.

By the 8th section of the act of 28th February, 1799 (1 Little & Brown, 626), it is provided, that "if any informer on a penal statute, and to whom the penalty or any part thereof, if recovered, is directed to accrue, shall discontinue his suit or prosecution, or shall be nonsuited in the same, or if upon trial judgment shall be rendered in favor of the defendant, unless such informer be an officer of the United States, he shall be alone liable to the clerks, marshals and attorneys for the fees of such prosecution; but if such informer be an officer whose duty it is to commence such prosecution, and the court shall certify there was reasonable

The Steamboat Planter.

ground for the same, then the United States shall be responsible for such fees." See, also, the 5th section of the act of 8th May, 1792, 1 Little & Brown, 277.

The statute contemplates not only prosecutions in the name alone of the informer, but also those in the name of the United States to the use in whole or in part of an informer, "to whom the penalty, or any part thereof, if recovered, is directed to accrue. If such informer be an officer whose duty it is to commence such prosecution, and the court shall certify there was reasonable ground for the same, then the United States shall be responsible for the same." It will also be seen that in case of an informer who is not an officer (which is the case here), the United States are not liable, and therefore if the informer be not liable, no costs can be recovered, no matter how malicious or vexatious the prosecution may be. *The Antelope*, 12 Wheat. Rep. 559. "It is a general rule (says the Supreme Court) that no court can make a direct judgment or decree against the United States for costs and expenses in a suit to which the United States is a party, either on behalf of any suitor or any officer of the government.

I think it appears from the above that an informer is liable, although the United States may be a party on the record, and also that the United States are not liable in this case. Can the court require him to give security for costs? 2 Brown's Civil and Admiralty Law, 356. "If both parties appeared on the appointed day, each was to give security *stipulatio*, or *satisfactio*; the plaintiff that he would prosecute his suit and pay the costs, if he lost his cause; the defendant that he would continue in court, and abide the sentence of the judge, i. e. bail to the action." This was the ancient civil law. The same practice prevails in the admiralty courts, on the instance side, or in other words in cases like the one under consideration. 2 Brown, 410, 411; Conkling's United States Admiralty, 463, 464.

"In a suit *in rem* both parties are actors." Sergeant's Com. Law, 234. "All persons interested in the cause of action, may be joined as libelants." Dunlap's Admiralty Practice, 95. In this case the informer has an interest, the same as that of the United States, as he receives half the penalty, that is \$250. It

will be seen by reference to that part of the libel and affidavit above set forth, that he is made a party—a party on the record—and would be entitled to his part of the penalty when brought into the court by the marshal, and a decree or judgment would be given against him for costs if unsuccessful. His interest is separate and distinct from that of the United States, each being entitled to \$250.

But to settle all controversy in regard to the matter, and for the information of all concerned in similar suits, the court made a general rule requiring an informer to give security for the costs when the libel is filed, and also providing that if not given when the libel was filed, a rule might be made on him to give such security; and if not given, that he should not be further recognized by the court as informer, and that his name should be stricken out, and that he should receive no part of the fine or penalty. Under this rule he was required to give security for costs, and being in court and declining to give such security, the rule was enforced against him. It will be seen that this proceeding leaves the United States free to prosecute either in the first instance, without an informer, or to prosecute after his name is stricken out. The necessity of establishing such rules and practice, and requiring security from informers, became manifest during the present term of the court. Eleven libels were filed against steam ferry boats for this term, by informers, without security for costs, and the boats arrested. No evidence was offered or alleged to exist, showing that they had been employed in any navigation other than that of ferries under licenses from state authority.

In the case of *The United States v. The Steamboat James Morrison*, ante, page 241, this court held that ferry boats were not liable for the penalties imposed by the act of 1838, above cited; the case was taken by appeal to the Circuit Court, and there affirmed. The opinion of this court in the case of *The James Morrison*, was published, as was also the decision of the Circuit Court, affirming its judgment.

The Circuit Court is the court of last resort in such case. In the face of these decisions these eleven suits were brought. The suit then proceeded in the name of the United States alone.

The libel was for running the boat without a license. The answer of the owners set up and exhibited a license upon its face, good in all respects. It appeared in proof that the owners had executed their bond according to law, and applied for license after the enrollment of their boat, which license was made out on the books of the office, by the surveyor and inspector, signed, sealed, dated and numbered; and the same on a separate sheet, also signed, sealed, dated and numbered. When the owners called at the office afterwards, it appeared that there had been no account or payment of the hospital dues: that the account could not at that time be made out, as the boat had, a short time before, been sold and transferred to the present owners, who did not know how many hands had been employed by the former owners, nor how long the boat had run, both of which it was necessary to know and state in writing: that a person rendering a false account was subject to a fine: that the former owners were absent, and therefore the information could not be obtained. Under these circumstances, the surveyor declined handing over the paper made out on the separate sheet, but gave the owners permission verbally to make the voyage they were prepared for; and on their return, the former owners being still absent, they made another voyage. For these two voyages this libel suit was commenced. On the day the writ was served, but after the service, the paper was delivered. The surveyor was not bound to grant license until the hospital dues were paid.

He states in his evidence that the enrollment and license were duly executed on the day they bear date, but the certificates were not delivered until afterwards; thus, treating the record in his office as the enrollment and license, and the papers delivered as evidence thereof. Be this as it may, he states positively, that the bond was given and the license was duly executed, was sealed, signed, dated and numbered; and the only question which can be raised is, "was delivery of the license necessary to give it validity?" He could grant a license before the hospital dues were paid, and the effect of which perhaps would be to make himself personally responsible for them; and this was his own understanding of the matter, as appears from the evidence of the chief clerk in his office.

A deed is an instrument executed by a private citizen, and is or was formerly only known to be his act and deed, because he delivered it as such. He has no public seal by which it can be known, and anciently when this law was established, not one person in a hundred, perhaps, could write his name; and his private seal was the impression of his tooth, or some other impression equally unknown to the public. Delivery is therefore essential to give it validity; and it takes effect only from delivery. 2 Black. Com. 306. It is not thus in regard to the acts of public officers, attested by public seals, and recorded in public records in public offices.

Where is the law to make delivery essential to their validity? I confess I have never seen such law, and certainly none was produced or cited. In the case of *Marbury v. Madison*, 1 Cra. 177; 1 Cond. Rep. 273, the Supreme Court of the United States says: "But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidence of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions the sign manual of the president and the seal of the United States are those solemnities. This objection does not touch the case."

This was said by the court in answer to an objection, that delivery was essential to give validity to a commission. I have not been able to discover any difference which can be material in this respect, between a commission and a license; neither of them is a deed made by a private citizen, which can only be known to be his act, by his having delivered it as such. Both are acts of public officers, in their official capacity; both have their sign manual and public seals, and both are recorded in public records in public offices; both are letters patent, or of the nature of letters patent. Blackstone (2 Com. 346) speaking of letters patent, says: "These grants, whether of lands, honors, liberties, franchises or aught besides, are contained in charters or letters patent, literal patentees, so called because they are not sealed up, but exposed to open view, with the great seal pendent at the bottom, and are usually directed or addressed by the king to all his subjects at large." This is precisely the case with commissions and licenses. They are both grants. A com-

mission grants the right to hold and discharge the duties of a certain office. A license grants authority to do a particular thing—in this case to carry on the coasting trade. They are both open letters addressed to everybody and under public seals.

If an original license were lost, could a copy from the record be evidence? Certainly not, without proof that the original was delivered, if such delivery be necessary to give it validity; yet such copy is, I believe, uniformly received in evidence without such proof of delivery.

Let us see the effect in the present case, of the doctrine that a license is invalid until delivered. It was not delivered until one month after it was executed. The bonds executed by the owners are conditional that the boat shall not, during the continuance of the license, be engaged in any trade whereby the revenue of the United States shall be defrauded, and shall not be used for any other vessel, or in any other employment than as specified in the license. They were not in force until the license took effect. If suit were brought for a breach during the month, the action would be defeated, by showing that the license had not been delivered. The license is granted for one year. If it have no validity until delivered, that would be considered its date, and it would run one month into the next year. If it commenced at its date, but yet was inoperative, it would be a license for eleven months only. The law requires that a record should be made of the licenses granted. This record would be false, if the license did not take effect for one month after being granted and recorded. The law also requires the licenses to be numbered, commencing with the year, and copies sent to the register of the treasury. Both the numbers and copies sent would be false if the license had no validity until delivered. If a suit were brought for running without a license after the expiration of a year from its date, it might be defeated by showing that the license commenced only from delivery, and the year from that time had not expired. The effect would be to falsify the record of the surveyor's office, and the records of the treasury department, and introduce confusion and uncertainty into all the public business relating to our commerce and navigation.

The Steamboat Laurel

If, on the other hand, the hospital dues be not paid, the surveyor is not bound to grant the license; if, however, he should do so, he may, perhaps, become responsible for them, but the non-payment would not avoid the license, and the owners would still be held liable for them.

For the above reasons, the court orders and decrees that the libel be dismissed, the bond given by the owners canceled, and the informer pay costs up to the time when his name was stricken out as informer.

THE UNITED STATES v. THE STEAMBOAT LAUREL.

District Court of the United States. District of Missouri. In Admiralty.

HON. R. W. WELLS, JUDGE.

1. By the second section of the act of Congress approved July 7th, 1838, entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," no forfeiture of the boat is declared, and no express lien given on the boat for the penalty, in case of a violation.
2. The expression in the second section, "for which sum or sums the steamboat or vessel so engaged shall be liable," is simply used to give a remedy against the boat by libel, and was not intended to give a lien expressed or implied.
3. Where a steamboat violated the said second section, but subsequent to such violation, was seized and sold under the Missouri "Boat and Vessel Act," by material men; *Held*, that the United States had no lien or claim, that could overreach the claim of the material men, who had now acquired title to the vessel.

The United States District Attorney, for the libelants.

Thomas B. Hudson, of counsel for claimant.

WELLS, J.—This was a libel and seizure of a steamboat under the act of Congress, approved 7th July, 1838, entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam."

The particular violation of the act alleged in the libel was

270 DISTRICT COURT OF THE UNITED STATES.

The Steamboat Laurel.

running the boat without a license under the second section, which is as follows :

"Section 2. That it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares and merchandises or passengers, in or upon the bays, lakes, rivers or other navigable waters of the United States, from and after the first day of October, 1838, without having first obtained from the proper officer a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of \$500, one-half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily by way of libel in any district court of the United States having jurisdiction of the offence."

The St. Louis Marine Railway and Dock Company intervened and filed a claim to the steamboat. The company had furnished materials for, and done work upon the boat, which, under the local law of Missouri, gave it a lien upon the boat. The statute of Missouri gave the lien, and directed the method of proceeding to enforce it. Under and in accordance with its provisions, the claim was filed in the Court of Common Pleas for St. Louis county, and under process from that court the boat was seized by the sheriff before the libel was filed. Subsequently the boat was sold by virtue of the same proceeding, and the company became the purchaser. No exception was taken by the United States to the legality or regularity of these proceedings.

No answer was filed or defence made by the owners of the boat, as those who owned the boat at the time she was run without the license. The boat had not been run since the claim of the company was filed in the Court of Common Pleas, nor since the work was done and materials found.

It will be seen by reference to the section above quoted, that there is no *forfeiture* of the boat declared, nor is there any *express lien* given for the penalty. On the part of the United States it was insisted by the district attorney that the section expressly

The Steamboat Laurel

declared that the *boat* should be liable for the penalty, and he insisted further that this liability existed, no matter who might have been the owners at the time the penalty was incurred or to whom the boat might have been transferred afterward: that a lien acquired or sale made subsequent to the act done, although previous to the finding of the libel, could not prevent this proceeding for the penalty.

The eleventh section of the act is as follows: "That the penalties imposed by this act may be sued for and recovered in the name of the United States in the District or Circuit Court of such district or circuit where the offence shall have been committed or forfeiture incurred, or in which the owner or master of such vessel may reside, one-half to the use of the informer, and the other to the use of the United States, or the said penalty may be prosecuted for by indictment in either of the said courts."

Has the United States a lien upon the vessel for the penalty? The act gives no express lien. The acts of Congress which give the United States a priority of payment in case of insolvency, or in the case of bankruptcy or death, where there is a general assignment of the property of the debtor, have nothing to do with this case. They give the United States a *priority of payment* out of the *proceeds* of the property, but give no *lien* or claim of any kind on the property itself. Nor do they avoid subsequent *bona fide* conveyances or liens: Act of 8d March, 1797, chapter 20, § 5; 10 Peters' Reports, 596; 12 Peters' Reports, 102; 1 Kent's Com. 243, 244, 245. It will be seen by reference to section 2, above quoted, that the fine or penalty is against the *owners* and not against the boat: "The owner or owners shall forfeit and pay to the United States the sum of \$500." It will also be seen by reference to that section and section 2, above quoted, that the United States have three methods of proceeding under the act for the enforcement of the penalty: by libel against the boat, and by suit and indictment against the owners. The expression in the second section: "For which sum or sums the steamboat or vessel so engaged shall be liable," is nothing but the phraseology used to give the remedy against the *boat* by libel, and was not intended to give any lien, either express or implied. "For which sum or sums

The Steamboat Laurel.

the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily by way of libel, in any district court of the United States having jurisdiction of the offence." As the fine or penalty is against the owners and not against the boat, without such provision there could have been no proceeding by libel against the boat. The proceeding by libel was given, doubtless, because the owners might not be found or might reside in some other part of the United States, and therefore make a proceeding against them either impossible or very inconvenient and expensive, as witnesses would have to be taken into some other perhaps remote district. Nor would an informer be likely, for an offence committed in one district, to hunt up and prosecute the owner or owners in some other district, or in several districts.

I know of no law, and none was cited, giving the United States a lien on any property for a fine or penalty. No case has been cited, and I know of none, wherein it has been held that the United States have such lien. If the case be likened to that of a foreign attachment, then the attachment first served holds the property, although the United States may be a party. In this case the property was first seized by the interveners. If it be likened to the case of an execution, the same principle prevails and governs. If it be like the case of several liens held by different persons, then in general, the oldest lien will have precedence. Here the claimant had a lien and the United States had no lien.

The case of a vessel declared by act of Congress to be forfeited for certain violations of law—and there are many such—is somewhat analogous to the present case, but much stronger in favor of the United States; in the case at bar there is neither forfeiture nor lien.

There is in the other case, not only a penalty, and the vessel declared liable, but the vessel is declared forfeited to the United States.

The act of Congress of 31st December, 1792, declares that if a false oath be taken in order to procure the registry of a vessel, the vessel or its value shall be forfeited. The United States filed a libel and seized the *Anthony Mangin*, as forfeited under this

act. After the offence was committed, but before the seizure by the United States, the vessel was sold to an innocent purchaser. The purchaser interfered. The District Court of the United States for the district of Maryland held his claim good—and that the forfeiture did not overreach the subsequent alienation. *The United States v. The Anthony Mangin*, 2 Peters' Admiralty Reps. 452. In this decision the United States acquiesced. The owner, who took the false oath, became bankrupt, and the United States brought suit against his assignee for the price or value of the vessel, it having been sold as aforesaid. The Supreme Court of the United States decided against this claim, and held that the United States had no claim to the vessel before seizure. The case is very like this case. There the vessel, or its value, was declared forfeited. The United States might proceed against the vessel or against the owner for the value. In this case the United States might proceed against the vessel or might proceed against the owners by suit or indictment. The Supreme Court held that until the United States elected to proceed against the vessel, they had no claim to it; and consequently, if the vessel were sold before they so elected, the sale would be valid. *United States v. Grundy and Thornburg*, 3 Cranch's Rep. 337.

The effect of a forfeiture on the subsequent claims of material men having a lien, came before the Supreme Court for consideration in the case of *The St. Jago de Cuba*, 9 Wheat. R. 416, and that court expressly decided that such claims, when fair, were not overreached by a previous forfeiture, and that the same principle applied to the claims of seamen for wages, to claims for salvage, and generally to maritime contracts.

The District Court of the United States for Wisconsin, in the case of *Putney v. The Sloop Celestine*, American Law Journal for October, 1851, page 167, held that the lien of material men was preferred to the claim of a *bona fide* purchaser without notice of the lien.

I think I might rest this case on the foregoing observations and authorities; but I will remark that if Congress had intended the United States should have a lien on the vessel for the penalty, it would have been easy to say so. They have not so provided, either in this, or, I believe, in any other case. And

Steamboat H. D. Bacon.

the reasons must be obvious. Who would purchase a vessel, assist in running her, or repair or give her an outfit, if the United States could deprive them of their just claims, because of some violation of law of which they were wholly ignorant? Even if they knew of acts committed in violation of law, they could not know that the United States would ever proceed for the penalty. Or if the United States were disposed to proceed for the penalty, who could tell whether they would proceed against the vessel rather than against the owners? Such lien would not only be unjust but would be highly injurious to commerce and navigation.

I think, therefore, that the United States have no lien or claim that can overreach the claim of these material men, who have now acquired title to the vessel.

The claim of the St. Louis Marine Railway and Dock Company is sustained, the libel dismissed and the bond given by the claimants, canceled.

EADS AND NELSON v. THE STEAMBOAT H. D. BACON.

District Court of the United States. District of Missouri. In Admiralty.

HON. R. W. WELLS, JUDGE.

1. Admiralty jurisdiction extends to the lakes and navigable rivers of the United States; the same above as below tide-water.
2. A lien exists for salvage services upon the property saved.
3. Possession is not necessary to give validity to a lien.
4. There is a difference between the right of retainer, merely, and a lien.
5. It requires the most unequivocal acts, on the part of the salvors, to show that they intend to abandon their lien, and resort to the owners for payment.
6. A master, when upon a voyage, is the general agent of the owner, and his admissions and declarations as such, and within the scope of his authority, are evidence against the principal.
7. The absurd rule which prevails in chancery courts, that the answer of the defendant when responsive to the bill, is equal to two disinterested witnesses, or to one witness with other circumstances of equivalent force, does not prevail in the admiralty courts.

Steamboat H. D. Bacon.

8. Nor does the same rule prevail, even when the answer is responsive to interrogatories propounded.
9. The true rule of construing salvage contracts, is that they shall be presumed, *prima facie* to be fair, but if proven to be unconscionable, the court of admiralty, like the court of equity in similar cases, would refuse to enforce it.
10. Admiralty courts have never put the compensation for salvage services upon the basis of pay for work and labor; but have ever considered that it was for the interest of commerce and navigation, that a liberal compensation should be allowed, and in proportion to the benefit received by the owners.
11. When the salvors by the use of their machinery and diving bell, worth \$20,000, raised a badly sunken steamboat in the Mississippi, valued at \$20,000 in twelve hours, held that the contracted price of \$4,000, was but just and reasonable.

Benjamin F. Hickman, for plaintiffs.

James S. Thomas, for owners of the boat Bacon.

This suit is a libel *in rem* against the steamboat H. D. Bacon, brought in November last, by Eads and Nelson, for salvage services rendered by them, in October last, with their diving bell, the Submarine No. 4, in raising the Bacon, which was sunk in the Mississippi river, about one hundred miles below Cairo.

The libel states, among other matters, that the plaintiffs were employed by the master of the Bacon—Henry Ealer, then on board and having charge of the Bacon—to raise her with their diving bell, then some two hundred miles below the Bacon, in the Mississippi river: that they repaired, with their diving bell, to the Bacon: that they informed the master that they would charge \$4,000 for raising her, to which he made no objection: that they raised her, and that said master refused to pay the said \$4,000, and was, at the time of the filing of the libel, about to remove his boat beyond the jurisdiction of the court: that the Bacon was not registered at St. Louis, and that they do not know who are the owners of said Bacon: that she is worth about twenty or twenty-five thousand dollars, and had on board, when sunk, a valuable cargo, being transported by her from New Orleans to St. Louis, on the Mississippi, a navigable river of the United States.

An affidavit to the facts stated in the libel, was made by one of the plaintiffs; process to seize the Bacon was ordered by the judge of this court. The boat was seized by the marshal, and

released on the filing of bond, in pursuance of the act of Congress of the 3d of March, 1847, entitled "An act for the reduction of costs and expenses in proceedings in admiralty against ships and vessels."

The owners of the boat filed their answer. They admit the employment of the diving bell: that it assisted in raising the boat: that they have no knowledge, nor do they believe the fact to be, that plaintiffs informed the master that they would charge for raising said boat, \$4,000: that they believe the boat could have been raised without the aid of the diving bell, but not in so short a time: that the boat is worth as much as stated by the plaintiffs: that the diving bell was not employed in raising the Bacon more than fifteen hours, and the charge is unreasonable and unjust: that \$2,000 would be a full, reasonable and just compensation, which they are and were ready and willing to pay.

The cause was submitted to the court, on libel, answer, amended answer, and proofs. The evidence was by depositions.

On hearing of the cause, the proctor for defendants denied the jurisdiction of this court, which was also denied in the amended answer

WELLS, J.—No one has ever doubted that salvage services, when rendered at sea, or in the navigable rivers, where the tide ebbs and flows, were subjects of admiralty jurisdiction; but the doubt has been, whether the admiralty jurisdiction of the courts of the United States extended on the navigable rivers above where the tide was felt. The Supreme Court of the United States, in the case of *The Thomas Jefferson*, 10 Wheaton's Rep. 428, held that the admiralty jurisdiction did not extend above the tide-water. *The Steamboat Orleans v. Phœbus*, 11 Pet. R. 175, is to the same effect. But in the recent case of *The Propeller Genesee Chief et al. v. Fitzhugh et al.*, 12 How. R. 443; and *Fretz et al. v. Bull et al.*, 12 How. R. 446; the former cases were overruled, and the admiralty jurisdiction declared not to be limited by tide-water, but to extend to the lakes and navigable rivers of the United States—on the rivers, the same above as below tide-water. The last-mentioned case was one of collision on the Mississippi river.

It was also contended by the proctor for the defendants, that this proceeding *in rem* [against the steamboat,] could not be maintained, as it depended on a lien existing at the time of suit brought; and that, in this case, there was no existing lien, it having been lost by the salvors delivering up the vessel after raising it, and permitting the master to proceed upon the voyage to St. Louis.

Several answers may be given to this objection:

1st. The 19th rule prescribed by the Supreme Court of the United States for courts of admiralty, provides that, "In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed."

2d. That there is a difference between a right of retainer, merely, and a lien—that possession is not necessary to give validity to a lien—that for salvage services there is a lien. *Outler v. Rea*, 7 How. R. 729.

3d. Admitting that a lien may be abandoned, yet the mere fact that the master and crew of the Bacon were permitted to carry her into port, was no abandonment of the lien. It is nothing more than is usual and almost universal in salvage cases. Is a vessel saved from shipwreck at sea to be kept by the salvors at sea until a libel suit is commenced and the vessel seized? Was it necessary to keep the Bacon in the Mississippi river, one hundred miles below Cairo, until a suit could be brought and a writ served? Or were the salvors obliged to leave their own vessel and take possession of the Bacon and dispossess the master and crew, or failing to do so lose their lien? It would require the most unequivocal acts to satisfy the court, in this case, that the salvors intended to abandon their lien and resort to the owners, when the salvors did not even know who the owners were, or in what place or places they resided. The plaintiffs offered evidence to prove that the master of the Bacon had agreed to give them \$4,000 for raising the boat.

The evidence consisted of the admissions and declarations of the master, whilst acting as master, after the arrival of the Bacon at

St. Louis, and before suit brought. The admissions and declarations were proved by one witness only. .

To this evidence, the proctor for defendants objected: 1st. Because incompetent, the declarations and admissions of the master not being competent evidence to charge the owners; and 2d. That the evidence of one witness was not sufficient to negative the answer of the owners, who therein denied the contract.

As to the first objection, the master, when upon a voyage, is the general agent of the owners, and they are bound by his acts.

Abbott on Shipping, 169, 219, note. "It is a general principle, that the acts of the master, at all events, bind the owner of the ship, as much as if the acts were committed by himself."

Pages 169, 220, note. "When the progress of a voyage is interrupted by any casualty, such as capture, shipwreck, or other accident, the master of the ship becomes, of necessity, an authorized agent for the owners, freighters, insurers, and all concerned. And whatever he undertakes, and whatever expenses he may incur, fairly directed to that purpose, become a charge upon them respectively, in the same manner as if incurred at their special request."

The court has no doubt of the power of the master, as the agent of the owners, to use and employ, at their expense, every necessary means to save his sunken vessel.

The admissions and declarations of an agent whilst acting as such, and within the scope of his authority, although made after the transaction to which they relate, are evidence against the principal. 2 Starkie on Evidence, part 4, pp. 56, 57.

As to the second objection, the court is of the opinion that the absurd rule which prevails in chancery courts, that the answer of the defendant, at best only an interested witness, when responsive to the bill, is equal to two disinterested witnesses, or to one witness and other circumstances of equivalent force, does not prevail in the courts of admiralty. 3 Howard Rep. 572; 2 Conkling's United States Admiralty, 620, 621, 622.

Nor does it prevail in the admiralty courts even when the answer is responsive to interrogatories propounded.

But there is another answer to this objection, which is, that the rule in courts of chancery, above mentioned, is not applicable to a case like the present, where it is not alleged by the plaintiffs or defendants that the matter was within the personal knowledge of the latter. The plaintiffs state that the contract was made with the master, and that they have no knowledge of the owners.

The owners do not allege that they were present on the occasion. Nor do the defendants, in their answer to the interrogatory, deny the contract; but state that "they believe and were so informed by said Henry Ealer (the master), that said petitioners said nothing about the charge they would make for raising said boat, and did not say they would charge \$4,000." The court is, therefore, of opinion that the said evidence is competent and sufficient to prove the contract, and that a contract was made to pay \$4,000 for raising said boat.

Judge CONKLING, in his valuable work upon the jurisdiction, law and practice of the courts of the United States, in admiralty and maritime cases, lays down the law in regard to salvage contracts thus: "Contracts of this nature, however, are not held obligatory by courts of admiralty upon the owners of the property saved, unless it clearly appears that no advantage was taken of their situation, and that the rate of compensation is just and reasonable. In that case the stipulated rate of allowance will generally be adopted and enforced by the court, as just and conscientious;" and several adjudicated cases are cited. 1 Conkling's United States Admiralty, 280.

If the law be laid down correctly in the foregoing extract, it is manifest that a contract would have no force or effect whatever. For, if the compensation agreed upon must be proved to be just and reasonable, the same proof would insure a recovery for the same amount, without any contract—and this without any proof "that no advantage was taken of their situation." But there are certainly many adjudicated cases or dictum to that effect—as well as many ancient laws and usages. *The Emulous*, 1 Sumn. Rep. 207; *Bearse v. 340 pigs copper*, 1 Story Rep. 314; *Shultz v. The Mary*, Bee's D. C. R. 139; *Laws of Oleron*, article 4, p. 29.

The true principle by which such cases should be governed, would appear to this court, with great respect for others, to be that established in like cases in courts of equity; that is, that a contract should be presumed *prima facie*, to be fair, but if proven to be unconscionable, the court of admiralty, like the court of equity, would refuse to enforce it.

But take either view of the law, it becomes necessary to look into the testimony in this case, to ascertain what compensation should be allowed; inasmuch as the defendants insist in their answer that the Bacon could have been raised without the assistance of the diving bell and apparatus, and that the charge of \$4,000 is "extortionate, unreasonable and unjust," and that \$2,000 would be a full, reasonable and just compensation.

Evidence on the part of the plaintiffs: Captain James Miller—now master of the steamboat Aleonia—been engaged in steamboating, on the western waters, twenty-seven years, the last twelve years as master of different steamboats; was along side of the Bacon after she sunk; remained there and took off part of her freight; did not believe it possible to raise her without the assistance of the diving bell; she was a badly sunk boat; she was badly bent from the after ends of the boilers to the bow; she was careened, and the water over one guard and part of the deck, whilst the other side was dry; she was a good deal worse sunk than the St. Paul. If the Bacon had been his boat, he would have been perfectly willing to give \$4,000 to raise her; would have given \$5,000 to raise her if she had belonged to him uninsured.

Captain Eaton is agent for St. Louis Board of Underwriters, and has been such for upwards of three years. It is one of his duties to go to boats that are sunk or in perilous circumstances, and on which or on whose cargoes the St. Louis underwriters have any insurance, and to take means to save the boat and cargo; frequently made contracts with bell boats; customary to give a certain per cent. of the property saved; to ascertain what is a fair compensation, reference must be had to the value, difficulty of raising, and the danger of total loss; twenty per cent. of the net value of the cargo saved is the lowest salvage he has ever given a bell boat, and seventy-five the highest; considers

The Steamboat H. D. Bacon.

\$4,000 a reasonable charge for raising the Bacon; she was worth \$20,000 as soon as raised, without repairs; the master of the Bacon contracted to pay McKinley fifty per cent. of the cargo of the Bacon as salvage; plaintiffs raised the steamer Pawnee, for which witness agreed to pay them fifty per cent; think it was more difficult to raise the Bacon than the Pawnee; speaks in high terms of the character and judgment of Capt. Miller; plaintiffs raised the Jewess and received fifty per cent. of her value; the amount of labor has nothing to do with the rate of compensation; the bell boat gets nothing if it does not succeed.

Franklin L. Ridgley is president of the Union Insurance Company of St. Louis. Plaintiffs received for raising the St. Paul, \$4,000; she was insured at the rate of \$16,000; thinks the charge of the plaintiffs for raising the Bacon a moderate one; plaintiffs raised the steamboat Republic, worth about \$4,500, and received \$1,500, and got two-thirds of the cargo, worth at least \$6,000; the steam pump of the diving bell Submarine, No. 4, throws from one hundred and fifty to two hundred barrels of water per minute; the Submarine No. 4, cost nearly \$20,000; it was worth over \$4,000 to raise the Bacon.

The above named witnesses were all familiar with steamboating. It also appeared that the Louisville insurance offices had a standing contract with plaintiffs to pay them twenty per cent. on the insured value of boats raised by them, on which there was insurance in any of those offices, when under the value of twenty-two thousand dollars.

On the part of the defendants:—David B. Roach was carpenter on the Bacon when sunk; the boat sunk on Sunday morning, and the diving bell reached her on the following Saturday, in the afternoon; there was a hole in bottom of the boat, about sixteen inches wide and eight feet long, tapering to a point at each end; commenced pumping a little after dark, on Saturday, and next morning she was afloat. Wm. McKinley was a passenger on the Bacon when she sunk; had been pilot, clerk and master at different times; went for the bell boat about two hundred miles down the river; made a contract with Henry Ealer, the master of the Bacon, by which he (witness) was to have one-half or fifty

The Steamboat H. D. Bacon.

per cent. of the cargo saved; then considered the boat a total wreck; thinks the said master was of the same opinion, as he went to Cairo to get boats on which to put the machinery of the Bacon; thinks \$2,000 would be an exorbitant price for raising the Bacon; forms his opinion from what he understood was charged for similar services, and from his own knowledge of such services; the similar services alluded to was the raising the Sam Cloon, the Jewess, the Pawnee, the D. A. Givens; thinks his own compensation of fifty per cent. of the cargo, was a fair compensation. James Woodworth was engineer on the Bacon when it sunk; thinks \$2,000 would be a big price for what was done in raising the Bacon. James Albright was mate on the Bacon when sunk, and yet is; thinks \$4,000 a pretty big price for raising the Bacon, but don't know what it was worth; knows nothing about such services.

On the part of the plaintiff:—Charles F. Dickson knows plaintiff received from the city of St. Louis \$2,500, and the wreck of the Jewess (exclusive of boilers and machinery) for raising and removing her, plaintiffs received \$2,500 for raising the D. A. Givens. It also appeared in evidence, that the cargo on board the Bacon was worth twenty-five or thirty thousand dollars, when sunk. The above is a very condensed statement of so much of the evidence as is deemed material to notice.

From the evidence, the court is of the opinion that the Bacon was badly sunk. This appears from the evidence of Captain Miller, Captain Eaton, and of the carpenter. It appears, also, that this was the opinion entertained by the master, as is apparent from the fact that he went to Cairo, a distance of about one hundred miles, to procure boats to receive and carry off the machinery of the Bacon; and from the fact that he contracted with McKinley to give him fifty per cent. of the cargo saved. McKinley also says that the master expected the boat to become a total wreck; McKinley was also of the same opinion.

It appears also that it was usual to allow a per centum on the property saved, in other words, that the owners should pay in proportion to the benefit received. This is also the general rule adopted by courts of admiralty, in regard to salvage at sea. It also appears that twenty per cent. was the lowest salvage paid

for raising boats by the diving bell; and that a much higher rate had frequently been allowed and paid. The Bacon, when raised, was worth, without repairs, at least \$20,000; twenty per cent. on that value, would be \$4,000, the amount claimed by the plaintiffs. The witnesses who testify on the part of the plaintiffs, declare that \$4,000 was a moderate compensation for raising the Bacon. If they or their employers have any interest or feeling on the subject, it must be in favor of reducing the compensation for such services. But it is not merely a matter of opinion with them. They state what has been paid in many cases, and what is usual and customary, and the principles upon which their opinions are based; all of which are very satisfactory to the court. On the part of the defendants, the witnesses are, or were, all connected with the Bacon. McKinley thinks \$2,000 would be an exorbitant price, but swears that the compensation of fifty per cent. on the cargo, allowed himself, was just and fair. His compensation would probably amount to eight or ten thousand dollars. There was neither ingenuity, skill or capital employed by him, and but little labor bestowed or expense incurred. He founds his opinion upon similar services, and the compensation allowed therefor; but it appears that the compensation in the cases alluded to by him, was greater than that claimed for raising the Bacon. The per cent. allowed was greater, although in some cases the amount received was less. In the case of the Pawnee, twenty-five per cent. was allowed, and it amounted to \$4,000; that boat being valued at only \$16,000.

James Woodward, the engineer, thinks \$2,000 would be a big price for what was done, but does not tell us why he thinks so; no doubt it was because the plaintiffs only worked some fifteen hours; nor does it appear that he knows anything about such services, or the principles upon which a compensation therefor is based. James Albright, the mate, thinks \$4,000 a pretty big price, but frankly confesses he knows nothing about such services. It is stated by Captain Eaton, that to determine what is fair compensation, reference is had to the value of the property to be raised, the difficulty of raising it, and the danger of total loss. And that the labor expended by a diving bell does not enter

284 DISTRICT COURT OF THE UNITED STATES.

The Steamer Henrietta.

into the account. The court is satisfied that these considerations form the true rule.

When persons, like the plaintiffs, by great ingenuity and skill, and at great expense, succeed in the construction of apparatus and machinery, by which a boat can be raised in twelve hours, which could not be raised at all without their machinery and apparatus, why should the owner of property complain of the shortness of the time employed? The sooner the property is raised out of the water, the better for the owners; long delay with many kinds of property, would be utter destruction to that property.

The compensation which is allowed for marine salvage services does, and necessarily must depend upon other considerations. But there, no diving bells, costing some \$20,000, are employed, and when not employed, going every day to decay. Property is not raised from the bottom of the sea, but only prevented from sinking. But yet in such cases, from twenty to fifty per cent. of the value of the property saved is usually allowed. The admiralty courts have never put the compensation upon the basis of pay for work and labor.

It is and ever has been considered to the interest of commerce and navigation that liberal compensation should be allowed salvors. Upon the whole case, the court is satisfied that \$4,000 is only a reasonable and just compensation, and accordingly will allow that amount.

HARRIS *et. al.* v. THE STEAMBOAT HENRIETTA, CYRUS
MATHEWS, Claimant.

*District Court of the United States. District of Missouri. In
Admiralty.*

HON. R. W. WELLS, JUDGE.

1. The admiralty and maritime law of the United States, except where it is changed by act of Congress, is as much the law of the United States as if it had been formally enacted word for word in a statute.

The Steamer Henrietta.

2. The laws of the United States "are the supreme laws," and cannot be changed or altered, modified or repealed by *state* enactments. ●
3. No right or privilege given or secured by the laws of the United States, can be abrogated, displaced or superseded by *state* enactments.
4. A lien given by the maritime law is a right.
5. If a state legislature should pass an act declaring that a maritime lien should have no effect in that state, or should be postponed to liens given by the laws of that state, such enactment would have no binding force or effect.
6. The act of the legislature of Missouri, entitled "An act concerning boats and vessels," does not abrogate, displace, or supersede, any lien given by the general maritime law of the United States.
7. A seizure and sale under the Missouri "act concerning boats and vessels," does not divest a lien given by the general maritime law.

Hudson & Thomas, proctors for libelants.

E. L. Edwards, proctor for the Henrietta.

WELLS, J.—This is a suit in admiralty, brought by the libelants against the steamer *Henrietta*, Cyrus Mathews claiming as owner. The facts of the case are agreed upon by the libelants and the claimants, and are as follows:

The counsel for the respective parties agree that the following facts shall be admitted on the hearing of this cause, viz:

1. That plaintiffs were copartners as alleged in their libel, and were residents of Illinois, as stated in said libel.
2. That the stores and supplies mentioned in said libel, and the amounts attached, were furnished to said boat as stated therein: that the same were necessary supplies for said boat, and were furnished before said boat was seized by said sheriff, and that the prices are reasonable.
3. That said boat was over one hundred tons burden: that she was duly enrolled and licensed for the coasting trade: that she was owned in Missouri, and employed in navigating the Mississippi river between St. Louis, Missouri, and St. Paul, in the territory of Minnesota.

For the defendant it is admitted:

1. That prior to the issuing of the writ in this case, the de-

286 DISTRICT COURT OF THE UNITED STATES.

The Steamer Henrietta.

fendant had been attached and taken into custody by the sheriff of St. Louis county, Missouri, on various warrants issued out of the St. Louis Court of Common Pleas, on demands which were liens on said boat, under the act of the General Assembly of this state, entitled "An act concerning boats and vessels."

2. That there were judgments rendered in favor of said attaching creditors, and said boat was, under an order of said Court of Common Pleas, sold to satisfy said lien claims: that all of said proceedings and said sale were strictly in accordance with the laws of the state of Missouri concerning boats and vessels: that at said sale, the intervener, Cyrus Mathews, became the purchaser of said boat, and received from said sheriff a bill of sale, which is herewith filed, marked A, and made a part hereof.

(Signed)

HUDSON & THOMAS, *Proctors for pl'ff.*

E. L. EDWARDS, *Att'y for Mathews.*

It appears from the libel and exhibits, that the supplies were furnished by the libelants at Galena, in the state of Illinois, in the months of August and September in the year 1855. It further appears, that after the supplies were furnished the boat made a trip to St. Louis, where other supplies were furnished by persons residing there, for which the boat was seized and sold as stated in the agreed case. The sale took place in December, 1855. Afterwards this libel was filed. It does not appear where the boat was enrolled, but it does appear that the owners resided in Missouri. The only question for the consideration of the court is, whether the seizure and sale in St. Louis, in the state of Missouri, gave a title to the purchaser discharged from the previous lien of the libelants, or whether the vessel is still subject to that lien in the hands of the purchaser.

The owners of the steamer resided in Missouri, and the supplies furnished by the libelants, were furnished by them at Galena, in the state of Illinois, where the libelants resided. For this purpose, Galena is deemed a foreign port; the port of St. Louis, the home port. 1 Conkling's Admiralty, 56, 57, 58, 59; Rule of the Supreme Court U. S. XII.

When material men furnish supplies in a foreign port, they

have a lien upon the vessel for the value of the supplies, by the general maritime law of the United States. That law infers that the supplies in the foreign port are furnished on the credit of the vessel. Ibid.

When the supplies are furnished in the home port, the general maritime law gives no lien. That law infers that the supplies in such home port are furnished, not on the credit of the vessel, but on that of the owners. If there be any lien, it is given by the local law of the state. Ibid.

In this case the lien of the libelants was at least equal, in point of dignity, and prior, in point of time, to that given by the state law, to enforce which the steamer was seized and sold in St. Louis.

Upon what principle is it that this lien of libelants, given by the general maritime law of the United States, is divested? They have done no act, the doing of which could divest it. They have omitted to do no act, the not doing of which could deprive them of their lien.

In delivering the opinion of the court in the case of *Rankin et al. v. Scott*, 12 Wheaton's Rep., Chief Justice MARSHALL says: "The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity, to a subsequent claimant."

It is thought, however, and was so urged by the claimant's proctor, that the lien of the libelants was divested or annulled by the proceedings under an act of the legislature, referred to in the agreed case. When a state law creates a lien, a state law may, in some cases, divest it. But that is not this case. The lien of the libelants is given by the general maritime law of the United States. By the constitution of the United States, Congress has the exclusive right to regulate commerce with foreign nations and among the several states; and the courts of the United States are invested with the admiralty and maritime jurisdiction. The 9th section of the judiciary act of 1789, declares that this admiralty and maritime jurisdiction is exclusively in the courts

of the United States. By the act of Congress of May 19, 1828, entitled "An act further to regulate process in the courts of the United States," it is provided, "that proceedings in the courts of admiralty and maritime jurisdiction shall be according to the principles, rules and usages which belong to courts of admiralty, as contradistinguished from those of common law, except so far as may have been otherwise provided for by acts of Congress," &c.

It is obvious, I think, from the above statement, that the admiralty and maritime law of the United States, unless where changed by act of Congress, is as much the law of these United States as if it had been formally enacted, word for word, in a statute. The laws of the United States, I need hardly say, "are the supreme laws," and cannot be changed or altered, modified or repealed by state enactments. Nor can any right or privilege given or secured by them be abrogated, displaced or superseded by such state enactments. A lien given by the maritime law is as much a right as is a mortgage or bottomry bond. It is clear, therefore, that if a state legislature should pass an act declaring that a maritime lien should have no effect in that state, or should be postponed to liens given by the laws of that state, such enactment could have no binding force or effect. *Dudley and others v. Steamboat Superior*, 1 Conkling's Ad. 57; *Sexton v. Steamboat Troy*, Decision of the District Court of the United States for the southern district Ohio, reported in American Law Register for August, 1855, 622; case of *The Globe*, in the District Court of the United States for the northern district of New York, reported in American Law Journal for July, 1851; *Bronson v. Kenzie et al.*, 1 How. R. 311.

Under these circumstances it would require very clear and explicit language in the statute of a state to convince us that such effect was intended by the legislature.

Has the legislature of Missouri passed an act by the provisions of which a lien given by the general maritime law of the United States is abrogated, displaced or superseded? I think not. In my judgment, the steamboat law referred to in the agreed case, relates wholly to liens given by that act;—to liens given by the act, and which the act could provide for taking away. I will at

The Steamer Henrietta.

present, refer only to one provision of that act. But it is, I think, conclusive. The 13th section is as follows:

"Section 13. When any boat or vessel shall be sold under the eleventh section of this act, the officer making the sale shall execute to the purchaser a bill of sale therefor, and such boat or vessel shall, in the hands of the purchaser and his assignee, be free and discharged from all previous liens and claims under this act."

Here, the very act which gives the lien, declares the effect of that lien and a sale under it. That sale is to free and discharge the vessel from all previous liens and claims under that act.

Now, as the lien given by the general maritime law of the United States—given in this case for supplies furnished in Illinois—is not given by the steamboat law of Missouri, it is not affected by that law, nor is the boat freed or discharged from the lien not given by nor claimed under that law.

The first section of the act (which gives the state liens), evidently confines those liens to cases where the supplies are furnished within the state. But that is not all: the whole act, and every provision in it, is limited to contracts made within the state.

This is put beyond all dispute, I think, by the last case determined by the Supreme Court of Missouri, in regard to the steamboat law. The Supreme Court declares that "the statute of this state, concerning boats and vessels, is limited in its provisions to contracts made within the state, with boats used in navigating the waters of this state." And this decision, the court further declares, is made in accordance with the cases of *Noble v. The Steamboat St. Anthony*, 12 Mo. R. 261; *Twichel v. Steamboat Missouri*, *ibid*, 412, and *Steamboat Raritan v. Pollard*, 10 Mo. R. 583.

It will be observed that the 13th section of the act (herein given at large), speaks of a sale made under the 11th section of the act. I will presently show that a sale under the 11th section is the only sale that could possibly divest a lien given either by that act or any other law. The other sales being mere sales under ordinary executions, which transfer the title of the owner, but nothing more; and if the title of the owner be in-

cumbered, the purchaser takes the title and property with that incumbrance.

It is urged, however, that the judicial proceedings (including the seizure and sale), in Missouri, under the steamboat law, transferred the vessel to the purchaser at that sale, freed and discharged from the lien of the libelants.

The lien of libelants, being one given by the general maritime law, not given by the statute of Missouri, and not arising from a contract made within the state, to declare it divested by those proceedings, would seem to be in direct contradiction to the whole scope and meaning of the act, to the express provisions of the thirteenth section in particular, and to the above quoted opinion of the Supreme Court of Missouri, in *James v. The Pawnee*, 19 Mo. R. 517. But there are difficulties, and they arise from decisions of the Supreme Court of Missouri. These decisions are made in the cases of the *Steamboat Raritan v. Smith*, 10 Mo. R. 527; *Finney v. Steamboat Fayette*, 10 Mo. R. 612; and *Steamboat Sea Bird v. Beehler*, 12 Mo. R. 569. They all relate to sales under judicial proceedings. In the first cited case it appears that the sale took place in 1843, and of course was governed by the law then in force; and the case was decided, not under the act of 1845, but under that of 1835, and the acts supplementary thereto. The provisions contained in the thirteenth section of the act of 1845 had not then been enacted. The provisions of that section are most important, as they expressly declare the effect of a sale, as already seen.

Although the language of the opinion is somewhat general, yet it must be taken in connection with the subject it treats; and, by examining the facts it will be seen that the liens were given by the steamboat law of Missouri, and the sales were under the same law.

The next case (*Finney v. Steamboat Fayette*), was, as I understand the facts, a suit brought under the steamboat law, in St. Louis, in February, 1842, for supplies furnished in November, 1841. The boat was claimed by one Alexander, who pleaded a suit brought before a justice of the peace in Illinois, against the boat, in December, 1841, under the steamboat law of that state, a judgment obtained against the boat, and a sale in

The Steamer Henrietta.

January, 1842, of the boat by a constable, at which sale Alexander became the purchaser. The process under which the boat was sold, was an execution commanding the constable "to make sale according to law, of said boat, or so much thereof as will satisfy the judgment (about \$30), and all costs of suit." This sale in Illinois was held by the Supreme Court of Missouri to divest the previous lien acquired by Finney in Missouri. The lien of Finney arose under an amendment to the steamboat law, passed 12th February, 1839, the same as that contained in the act of 1845.

In delivering the opinion of the court, the judge says: "The case is similar in principle to that of the *Steamer Raritan v. Smith*. It was then determined that the rules of the maritime law, were, in proceedings against steamboats, to govern when there was a failure of statutory regulations. Maritime liens in respect to the mode in which they may be discharged, vary from other liens. A judicial sale will divest them, in whatever jurisdiction it may be decreed."

This opinion is not one giving a construction to a statute of the state of Missouri; but it regards the general maritime law of the United States. And, with the greatest respect for the Supreme Court of Missouri, I can neither adopt the reasoning of the court, as applied to the facts, nor the conclusion at which it arrives. When a material man, having a lien, proceeds against a vessel, in an admiralty court, a writ issues to seize the vessel, and it also requires that all persons interested should be notified to appear and defend; then notice is published in a newspaper to all interested to appear. Unless the vessel is in danger of perishing, no sale is ordered until all persons interested have an opportunity to be heard. All persons interested are allowed to appear, and set up their claims to the vessel, or the proceeds of the sale of the vessel. When the vessel is sold by an order of the court, it is for the benefit of all concerned. The proceeds of the sale are paid into the registry of the court, and apportioned among all; or if the proceeds be sufficient, all are paid the full amount of their judgment. Chief Justice MARSHALL, in delivering the opinion of the Supreme Court of the United States, in the case of *The Mary*, — *Stafford, Master*, 9 Cranch's Reports,

126, says: "The whole world, it is said, are parties in an admiralty cause, and therefore the whole world is bound by the decision. The reason on which the dictum stands, will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him." * * "But those who have no interest in the vessel which could be asserted in the Court of Admiralty, have no notice of her seizure, and can on no principle of justice or reason be considered as parties in the cause, so far as respects the vessel." I could cite any number of cases to the effect that no judgment, or sale under a judgment, can bind any but parties or privies; and that no person is deemed a party unless he have notice actual or constructive, and that, if a person interested would not, from the nature of the proceedings, be allowed to assert his rights, then those proceedings can in no respect affect those rights. Indeed to take away his rights by such doings, would not be judicial proceedings—they would amount to a confiscation, a confiscation of his rights for the benefit of others. Mr. Justice STORY, in the case of *Bradstreet v. The Neptune Ins. Co.*, 3 Sumner's Rep. 607, says: "It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence, before his property is condemned." Judge STORY further declares that if a person have not such opportunity, and yet is deprived of his rights, the proceedings are not judicial, but arbitrary edicts, deserving not the respect of any other nation, and ought to have no intrinsic credit given to them, either for their justice or truth. Had the material man in St. Louis any notice of the proceedings in Illinois? None appears in those proceedings. Could Finney have asserted his claim or had it allowed against the boat in that suit? I think clearly not. It was an ordinary suit at common law, merely using the name of the boat, instead of the owners, a warrant of seizure like a *capias ad respondendum*, and a judgment against the boat for some \$80; an execution against the boat directing the con-

The Steamer *Henrietta*.

stable to sell the same, or so much as might be necessary to satisfy the debt and costs. In such suit, Finney would have had no more right to intermeddle, than he would have had if the suit had been against the owner by name. The sale was merely a sale of the right of the owner to so much of the boat as would bring the \$30 and costs. And it was of course sold, as in other cases of sales on executions, subject to all mortgages and liens then existing. On such sale there could be no money to divide among other creditors having liens. I have already shown that such proceeding is unknown to a court of admiralty.

The next case referred to above, is that of *The Steamboat Sea Bird v. Beehler*. The plaintiff acquired a lien against the boat in St. Louis, under the steamboat law of Missouri, for supplies. After plaintiff's lien was obtained, suit was brought against the owners in Louisiana, and the boat was there seized on writ of attachment against the boat, and sold to satisfy the judgment. The Supreme Court held that such sale did not divest the plaintiff's lien. In my judgment there is no substantial difference between the sale in Illinois in one case and that in Louisiana in the other case. In both cases the boats were seized and sold merely to satisfy the debts of the plaintiff. No other persons, having claims, had a right to interfere; nor was any money raised by the sales to satisfy other claims. The reasoning of the court in this case, when applied to the sale in Illinois, in the previous case, clearly shows that the sale in Illinois could not divest the lien of Finney in Missouri. The court explains, that there is a great difference between the principles which govern suits and sales at common law and those in admiralty. In the maritime proceedings, it says, the sale is made for the benefit of all whom it concerned. And "this is the case under our statute as it now stands." It further says a sale under our statute concerning boats and vessels, is similar in all respects to sales under the maritime laws: "Such sales are not made for the benefit of any particular creditor, but for the benefit of all persons interested. Provision is made for the distribution of the proceeds *pro rata* among all who will come forward and establish their claims within a specified time." The court says

it is for these reasons that the sales conclude all persons having claims.

All the above is very sound law as regards proceedings in the maritime courts. But how does it comport with the sale in Illinois, which, in the previous case, was held to divest the lien in Missouri? In Illinois the sale was merely to raise \$30 to pay the plaintiff's judgment, and the boat was sold for his benefit alone. There was no sale "for the benefit of all persons interested." There was no "distribution of proceeds of sale, *pro rata*, among all who would come forward and establish their claims." The case of *The Sea Bird* clearly, in my judgment, overturns the previous case of *Finney v. Steamboat Fayette*.

I will now proceed to show that so much of the case of the *Sea Bird v. Beehler*, as declares that sales under the steamboat law of Missouri are like those in the admiralty court, is overturned by the next case cited. *James, v. The Pawnee*.

In the case of *The Sea Bird*, I have quoted the opinion of the court, that sales under the maritime law "are for the benefit of all interested." "The proceeds are divided *pro rata*," &c., "and this is the case under our statute, as it now stands."

In the case of *James v. Pawnee*, the court decides (unanimously) that a person having a claim or lien not arising from contract made within the state, cannot be allowed to intervene and have his claim allowed, nor receive any part of the proceeds of sale.

The statement of the case is a little obscure, but, to put the matter beyond doubt, I caused the records and proceedings in the Supreme Court to be examined, and there it fully appears that two complaints were filed against the Pawnee; under them writs issued, the boat was seized and sold under the provisions of the 11th section; notice was given to creditors to appear. James, who was not one of the original plaintiffs, but who intervened for his interest, filed his claim, which was for coal furnished the boat at Memphis. The claim was allowed in the court below, on the ground that the boat was employed in navigating the waters of this state, and the claim was a lien on the boat. The Supreme Court reversed the judgment below solely

The Steamer Henrietta.

for the reason that the provisions of the steamboat law did not apply to any contracts not made within the state.

Here, then, the very foundation of all the reasoning of the court in the last cited cases, is overturned. The sales under the steamboat law are not made "for the benefit of all concerned." Claimants, whose contracts were made in another state, can receive no part of the proceeds of such sale. No provision exists for making distribution among them. Sales under the state law are not like those made by the admiralty courts.

I have too high an opinion of the Supreme Court of Missouri, to suppose for one moment that it would hold, a creditor having a lien on a boat arising from a contract made in another state, could not be heard in a proceeding under the steamboat law, nor have his claim allowed, and yet, at the same time hold that the proceeding deprived him of his lien.

It is obvious, I think, that the previous decisions were made whilst the court entertained the opinion that claims arising on contracts made in other states, could be heard and allowed under the steamboat law in this state. The law, it seems, is now settled that such claims cannot be allowed in this state under that statute.

There remains one other matter to notice under the steamboat law, where a bond is given for the return of a steamboat, and the boat is returned accordingly; the boat is not sold under an order of court for the benefit of all the creditors having claims under that act. But a judgment is rendered against the boat by name, and an execution issues, under which "the sheriff may sell such part of the boat or vessel, or her tackle, or furniture, or such interest therein as may be necessary to satisfy the judgment and costs." See section 20. This is a similar proceeding to that mentioned in the case of *Finney v. The Steamboat Fayette*, which occurred in Illinois. No part of the steamboat law declares that such sale can divest any liens, not even those given by that act. It is not such sale as is mentioned in section 18, which refers to sales made under the 11th section, and not to those made under the 20th section.

The Supreme Court of Missouri, so far as I have noticed, makes no distinctions between the different kinds of sales under

Ashbrook et al. v. The Steamer Golden Gate.

that act. But I think I have already shown, that under no principle of law or justice could such proceeding divest any lien—certainly not the lien of libelants. Yet, as far as appears from the agreed case, the sale relied upon by the claimant to divest libelant's lien, may have been of the kind just mentioned. For this reason, also, I would decide against the claim.

The opinion of the court, therefore, is, that the libelants have a valid lien, not affected by the sale relied on by the claimant, and that said lien must be enforced.

ASHBROOK *et al.*, Libelants v. THE STEAMER GOLDEN GATE.

District Court of the United States. District of Missouri. In Admiralty.

HON. R. W. WELLS, JUDGE.

1. Under the judiciary act of 1789, the courts of the United States have cognizance of all civil cases of admiralty and maritime jurisdiction, exclusive of the state courts, except as to the common law remedy.
2. The common law remedy existed before the constitution and act of 1789, and is by the latter *saved*, not *given*.
3. A common law *remedy* is a remedy by *action* at common law, and is not a proceeding *in rem* or against the vessel.
4. A proceeding *in rem* is not a common law remedy.
5. The admiralty and maritime jurisdiction of the United States *in rem*, is *exclusively* in the United States courts.
6. There is no concurrent jurisdiction *in rem* in admiralty cases between the courts of the United States and of the several states.
7. The proceedings under the statute of Missouri, entitled "An act concerning boats and vessels," are not *strictly* proceedings *in rem*.
8. Where, as in this case, a material man has a lien upon a vessel under the general maritime law of the United States, he has a right to enforce that lien by a suit in the United States court, although the vessel may have been subsequently seized and sold under the Missouri act concerning boats and vessels.
9. Where a material man has no lien under the general maritime law, but has a lien under the state law, and the same law provides certain proceedings by which that lien may be divested, if those proceedings are had, his lien is divested, and he cannot sue in the United States court.

John H. Rankin, proctor for libelants.

Hudson & Thomas, proctors for respondents.

WELLS, J.—In this case certain of the libelants had liens under the general maritime law of the United States; and others had liens under the statute of Missouri, entitled "An act concerning boats and vessels." Digest Laws of Missouri, 1845, page 180. Those having liens under the general maritime law, furnished supplies in Cincinnati, Ohio, where they resided at the time, and whilst the boat was owned in Missouri; others resided in Missouri, and furnished supplies whilst the boat was owned in Ohio.

Those having liens under the state law resided in Missouri and furnished the supplies there, the boat at that time being also owned in Missouri.

After the supplies were furnished, the boat was sold under the provisions of the above cited statute of Missouri; and the question now raised for the consideration of the court is, were these material men divested of their several liens by not intervening in the state court, or by the proceedings in the state court? It is a question of delicacy, as the decision of it may conflict with state laws; but I am compelled to decide it.

The provisions of the statute of Missouri make no distinction in terms between vessels owned by citizens or subjects of foreign nations, or citizens of other states of the Union, and those owned by citizens of Missouri.

They apply to "every boat or vessel navigating the waters of this state," (see the act, § 1,) and to "contracts made *within this state* with boats used in navigating the waters of this state." See the case of *James, respondent v. The Steamboat Pawnee*, 19 Missouri Rep. 517.

If I understand correctly the language of Judge STORY, he entertained the opinion that similar provisions in the statutes of the state of New York could not properly be construed to apply to any but domestic boats or vessels—that is, those owned in New York. *The Barque Chusan*, 2 Story's Rep. 461, 462. But the Supreme Court of Missouri makes no distinction between foreign and domestic vessels. *James v. The Pawnee*, *supra*.

The case now under consideration differs from that of *The Henrietta*, *ante*, page 284. In that case the boat was owned in Missouri, and the supplies were furnished in Illinois. I held that the case did not come within the provisions of the steamboat law of Missouri, because the vessel was not, at the time the contract was made for the supplies, "navigating the waters of this state;" nor was the contract made or supplies furnished "within this state," and, therefore, the lien obtained in Illinois under the general maritime law, was not divested by the sale in Missouri. But much of the reasoning in that case is applicable to this case, and will not be here repeated.

Is the admiralty and maritime jurisdiction *in rem*, exclusively in the United States courts? When I wrote the opinion in the case of the *Henrietta*, I had never known it questioned; but in a recent decision by the Supreme Court of Ohio, it is questioned and denied. See *Thompson v. Steamer G. D. Morton*, 2 Warden's Ohio State Reports, 26. That court appears to think that the provisions of the ninth section of the judiciary act of Congress makes the jurisdiction of the district courts exclusive only as relates to the circuit courts of the United States. In that opinion I cannot concur.

The ninth section of the judiciary act, 1789, declares that the district courts of the United States shall have, in certain cases specified, first: Jurisdiction or cognizance exclusive of the courts of the several states. Second: In other cases jurisdiction concurrent with the courts of the several states, or the circuit courts of the United States, as the case may be. Third: And in other cases, exclusive original cognizance, without mentioning any other courts, either federal or state; and this last includes all civil causes of admiralty and maritime jurisdiction, including certain seizures on water, "saving to suitors, in all cases, a common law remedy, where the common law is competent to give it;" and a like cognizance in other cases of seizure without any saving.

In the first class of cases, as I have arranged them, the jurisdiction is not declared to be exclusive except as to the state courts; and there is, therefore, an implied exception as to the

jurisdiction of the circuit courts of the United States. In the second class, the grant is not declared to be exclusive, but concurrent, and the jurisdiction both of the courts of the several states and the circuit courts of the United States is excepted. In the third class there is no exception of the exclusiveness as to either the courts of the several states or the circuit courts of the United States, except as to the common law remedy in the first branch of that class, and without that exception as to the other branch. So that, in the third class, which includes the admiralty and maritime jurisdiction, there is no exception except that of the common law remedy, as to the exclusiveness of the original jurisdiction in the district courts. It is absolute, unconditional and exclusive. But the grant of exclusive *original* jurisdiction to the district courts, does not exclude the *appellate* jurisdiction of the circuit courts, which is also provided for in the twenty-first section of the same act. This seems to me conclusive.

Again: As to all other matters mentioned in the third class, there never has been any doubt as to the jurisdiction being exclusive as to the state courts. Why then is it not exclusive as to the admiralty and maritime jurisdiction? The same language is used as to all.

The Supreme Court of the United States, Judge MARSHALL delivering the opinion, in the case of *Slocum v. Mayberry*, 2 Wheat. R. 9, expressly decided that the jurisdiction of the United States courts, as to seizures on land and water, is exclusive of the courts of the several states. This is embraced in the second branch of the third class above. In the case of *Galston v. Hoyt*, 3 Wheat. R. 246, the question in the Supreme Court of the United States is put beyond all dispute. The court is discussing the question of the exclusive jurisdiction of the United States courts *as it regards the state courts*, and declares that "By the judiciary act of 1789, chapter 20, § 9, the district courts are invested with *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, and all seizures on land and water, and of all suits for penalties and forfeitures incurred under the laws of the United States."

Similar phraseology is used in the eleventh section of the

300 DISTRICT COURT OF THE UNITED STATES.

Ashbrook et al v. The Steamer Golden Gate.

judiciary act, which gives the Circuit Court "exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct," without mentioning the state courts; yet no one has ever doubted that the jurisdiction here given, was exclusive of the state courts. See also 1 Conkling's Ad. 849.

The opinion (excepting so much as regards the effect of the 8th section of the judiciary act) given by the Supreme Court of the state of Ohio, in the case above cited, and the opinion expressed by that court in the case of *Keating v. Spark*, 3 Warden & Smith's Ohio Rep., do not apply to the case I am considering, although they deny exclusive jurisdiction *in rem* to the United States courts in admiralty causes. The cases in which those opinions were delivered, arose and had to be decided under the act of Congress of the 26th February, 1845 (5 Lit. and B. 726), which applies only to the lakes and their connecting rivers, and which not only saves the common law remedy, but also "any concurrent remedy which may be given by the state laws."

1st. Let us now see how the matter stands. The courts of the United States have cognizance of all civil causes of admiralty and maritime jurisdiction, and have it exclusive of the courts of the several states, except as to the common law remedy.

2d. This is a civil cause of admiralty and maritime jurisdiction.

3d. The libellant has a lien given by the general maritime law of the United States; it is as much a vested right as that of a mortgage. It is a contract which the legislature of a state can pass no law to impair. *Bronson v. Kinzie*, 1 How. R. 311.

4th. The party having this lien is entitled to sue in the United States court, in admiralty, to enforce it. This right is given by the laws of the United States.

5th. The laws of the United States are supreme over state laws.

6th. A state law comes in and declares that the party having this lien shall either sue in the state courts (under the "act concerning boats and vessels,") or lose his lien.

Can it be possible such state law is valid? The United

States law, and the state law cannot both be enforced. The first gives the party a right to sue in the United States courts, and there to establish his claim and obtain the enforcement of his lien; the second declares that if he does not sue in the state court, that is, if he sues in the United States court, he shall get nothing.

I refer to the case of *Shelby v. Bacon et al.*, 9 How. R. 69, 70, 71, to show that where a person has the right to sue in the courts of the United States, no state law, and the proceedings of no state tribunal, can deprive him of that right. It is substantially as follows: The bank of the United States, after obtaining a charter from the state of Pennsylvania, failed. It made assignments of its assets under the laws of that state. The assignees, according to those laws, were to receive and collect the assets and allow debts and pay creditors; all under the control and jurisdiction of the Court of Common Pleas of that state. If creditors did not exhibit their claims and get them allowed, they obtained no part of the assets of the bank.

A creditor who resided in Kentucky, brought suit in the Circuit Court of the United States. The assignees pleaded to the jurisdiction of the court. The case went to the Supreme Court of the United States. That court held that the plaintiff, as a citizen of another state, had a right to sue in the courts of the United States, and the state law could not deprive him of that right. The court says: "To establish this claim as against the assignees, the complainant has a right to sue in the Circuit Court (of the United States), which was established chiefly for the benefit of non-residents." "On the most liberal construction favorable to the exercise of the special jurisdiction, the rights of the plaintiff, in this respect, could not, against his consent, be drawn into it." "Citizens residing, perhaps, in a majority of the states of the Union, are debtors or creditors of the bank. It is difficult to perceive by what mode of procedure the state of Pennsylvania can obtain and exercise an exclusive jurisdiction over the rights of persons thus situated."

It appears to me that if a person having a lien under the general maritime law, cannot resort to this court—a court of exclusive jurisdiction in admiralty cases—because of the provisions

of the state laws and proceedings under them, then the whole subject is reversed, and the state courts have the exclusive jurisdiction; and in that way the entire jurisdiction, in all cases, of the courts of the United States, might be absorbed by the state courts. I am speaking of the effect of such laws, not of the motives or intentions of the legislature in passing them; for, to do the legislature of Missouri justice, the steamboat laws were enacted some sixteen years before it was understood that the United States courts had jurisdiction of cases arising out of our inland navigation upon the public rivers of the United States.

The act of Congress, section 9, above referred to, saves to suitors the right of a common law remedy, when the common law is competent to give it. It is a common law remedy, as distinguished from a remedy in the admiralty, or in chancery. This common law remedy existed before the constitution and act of 1789, and is, by the latter, saved, not given. 2 Brown's Civil and Admiralty Law, 111, 112. But a common law remedy is a remedy by action at common law, and is not a proceeding *in rem*, or against the vessel itself. Ibid, and note 53 to page 111. Courts of common law do not proceed *in rem*. *Percival v. Hickey*, 18 Johns. R. 292; *Waring v. Clarke*, 5 How. R. 461; *Clarke v. New Jersey Steam Navigation Co.*, 1 Story's R. 538, 539; 1 Kent's Com. 378 (2d ed.) Opinion of Mr. Justice CATRON, in *Waring v. Clarke*, *supra*. And therefore a proceeding *in rem* cannot be a common law remedy.

The common law is competent to give a remedy in many cases, which are cases of admiralty and maritime jurisdiction. Thus a material man may proceed in admiralty either against the vessel *in rem*, or against the owners *in personam*, or against the master *in personam*. He has also his remedy at common law, which would be an action of debt or assumpsit against the owners, or a like action against the master for the value of the supplies furnished.

In some, if not all cases of collision, where a party injured could maintain a suit *in rem* in the admiralty, he could also maintain an action of trespass at common law. *Percival v. Hickey*, *supra*. So an action of trover will lie in many cases of a wrongful dispossession of vessels, although there is a remedy

also in the admiralty. Why are suitors, not suing in the admiralty, but in the state courts, limited to a common law remedy, and are not authorized to proceed *in rem*? The proceedings against ships and vessels affect the citizens and subjects of foreign nations, as well as the citizens of the several states; and it is important that the principles and rules for determining rights and injuries, and the courts to administer them, should be those known to the law of nations; and those principles and rules should be uniform throughout the United States, so also of the remedies.

If the courts and officers, including justices of the peace and constables, of the several states, can proceed *in rem*, against the vessels of other states, so they can against foreign ships and vessels, and thus ships would be seized, voyages would be broken up, the United States involved in difficulties and reclamations with foreign nations; a multiplicity of laws, rules and proceedings, contradictory and inconsistent with each other in the several states, be introduced; and thus the exclusive right and jurisdiction of the United States over our foreign relations, and over the commerce and navigation of the United States, both foreign and domestic, would be interfered with and rendered impracticable. And the states themselves would soon get into conflicts of jurisdiction and laws, and resort to laws retaliatory and vexatious upon the shipping of each other, as was the case before the adoption of the federal constitution.

It must be remembered, also, that the navigable rivers of the United States are not the exclusive property of any state or states, but are common to all. Benedict's Ad. 114. And that vessels navigating those rivers are enrolled and licensed by the United States, and that such license imports full power and authority to navigate them; and no other authority is necessary.

In relation to the authority of the United States courts and the state courts in admiralty cases, see *The Spartan*, Ware's Rep. 147; *Certain Logs of Mahogany*, 2 Sumner's Rep. 592; *Wall v. The Royal Saxon*, 2 American Law Register, 324; 1 Haggart's Ad. R. 298; *The Flora v. The Globe*, American Law Journal for February, 1851.

I do not find any reported case in which is satisfactorily dis-

cussed and decided the question how far, under the 9th section of the judiciary act, the courts of the several states have jurisdiction to proceed *in rem* against ships and other vessels enrolled or registered and licensed under the laws of the United States. I find cases decided, which arose under the act of 1845, extending a quasi admiralty jurisdiction to the lakes and their connecting rivers; which are, as already shown, not applicable to the commerce and navigation on other rivers. Some other cases speak of a concurrent remedy at common law, and say that the jurisdiction of the courts of the United States is not exclusive.

This is all true, because the common law remedies are saved; but they do not discuss the legality of a proceeding in the state courts *in rem*, and how far it is affected by the 9th section of the judiciary act. It was said in the case of *The Ship Robert Fulton*, 1 Paine's Rep. 420, that under the law of New York, a somewhat similar statute to that of Missouri, the state courts proceed *in rem*, and have a concurrent jurisdiction. After a most careful, and I may say, laborious investigation of the subject, I cannot discover on what principle that opinion can be maintained. The court merely says, "that the state tribunals had authority also to enforce the lien (given by the statute of New York), in the present case, is very certain, from the express provisions of the law of New York. There was, then, a concurrent jurisdiction in the two courts, and the proceedings under the state authority were in the nature of proceedings *in rem*." Now, with the greatest respect for the opinions of the learned judge who delivered the above opinion, it appears to me that the concurrent jurisdiction *in rem*, of the United States and state courts, cannot depend on the statutes of the state, but on those of the United States.

Let us examine carefully and critically the language used in the constitution of the United States, and also that used in the 9th section of the judiciary act; it will aid us in the investigation. The constitution declares that, "The judicial power shall extend to *all* cases of admiralty and maritime jurisdiction." The 9th section of the act declares that, "The district courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." "Saving

to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

It has been said that, perhaps there has never been in the United States, a law more carefully and ably digested, than that of 1789. In this opinion I fully concur. It has remained almost untouched for sixty-seven years; it originated in the Senate, which then possessed men of eminent ability, several of whom were distinguished members of the Federal Convention. Oliver Ellsworth, afterwards chief justice of the Supreme Court of the United States, was chairman of the committee to whom the subject was referred, and who is said to have prepared the bill.

Observe, the only exception to the exclusive cognizance is, not a remedy in the common law courts, but a common law remedy. The remedy is to be the common law remedy, no matter in what state court it may be sought, or what may be the system under which the court may proceed. There is also a qualification of this saving of a common law remedy; it can be only in a case "where the common law is competent to give it." This qualification was, doubtless, intended to cut off new remedies which might be devised, but which were unknown to the common law; for, if the common law was not competent to give the remedy sought, then the party could not resort to any other, but must sue in the United States court in admiralty. A suitor cannot therefore say "a common law remedy is saved to me, and if there be none to effect my object (the seizure of a vessel), I can use any the legislature may have devised for my case."

What, then, is the common law remedy spoken of in the ninth section? In my judgment, it can be only common law actions, actions of debt, assumpsit, case, trespass, trover, &c., as known and practiced at the common law. Such are the only common law remedies then, or indeed now known; and these, in many cases, are proper remedies, and such as the common law is competent to give. But a proceeding by bill in equity is unknown as a common law remedy; and a proceeding *in rem* is unknown as a common law remedy. What lawyer ever knew or heard of a proceeding *in rem* as a common law remedy? Even the actions of detinue and replevin have in them nothing of the nature of

proceedings *in rem*. Each requires a plaintiff and defendant who are persons, and the judgments bind no one but parties and privies. True, a proceeding *in rem* may be used in common law courts of the states, but in all such cases it is given by statute, or is a proceeding under the civil law. And the fact that it is given by statute and did not exist before the statute which gave it, in states where the common law prevails, shows that it had no existence as a remedy at the common law. I do not speak of modifications and improvements of actions at common law, which may doubtless be made by the legislatures, and still be within the meaning of the ninth section, but the proceeding *in rem* is given originally and entirely by statutes, where it exists in common law courts, and is not merely modified and improved.

When a court has jurisdiction to proceed *in rem*, and does so proceed, its judgments are binding and conclusive on the whole world, and this is so, whether the tribunal be foreign or domestic. *The Mary*, 9 Cranch's R. 126. Not so with judgments at common law: they bind only parties and privies.

If the state courts can have jurisdiction in admiralty cases conferred on them by state statutes, to proceed *in rem*, so they can to proceed in equity, and this would constitute them, to all intents and purposes, courts of admiralty; and this jurisdiction can be, and in many cases is given by the state laws to justices of the peace, and to constables, as their ministerial officers. If there is an average of fifty counties to each state, and twenty justices of the peace to each county, we should then have in these United States, thirty-one thousand courts of admiralty and maritime jurisdiction, to say nothing of the courts of record. These courts proceeding against, and seizing and selling vessels of foreign nations, and those of sister states, although they would have all the powers of courts of admiralty, yet they would, in but few instances, proceed according to the maritime law, which is part of the law of nations, nor according to acts of Congress (for Congress can pass no law regulating proceedings in the state courts); but they would proceed according to the statutes of the several states, and usages that would there prevail: each state having a different system. The effect of this must be, it appears to me, to embroil the United States with

foreign nations, and the several states with each other, and to produce retaliatory laws and proceedings, and endless conflict, uncertainty and mischief. And this, I repeat, would render nugatory the provisions of the 9th section of the judiciary act of 1789, and the power of Congress to regulate commerce and (navigation as incident thereto) with foreign nations and among the several states. If I am right in the views above expressed, there can be no concurrent jurisdiction *in rem* in admiralty cases between the United States courts and the courts of the several states.

I do not, however, consider the proceeding in the state courts of Missouri against boats and vessels as strictly a proceeding *in rem*. It is, it appears to me, a proceeding devised for suing the owners; but instead of using the name of the owner, it uses that of the boat. In some cases, arising under the act, a judgment is rendered against the boat for the demand of the plaintiff only, execution thereupon issues, and only enough is collected to pay the plaintiff's judgment and costs; and there is consequently nothing to distribute among other creditors or claimants. In no case can creditors, material men and others, although having valid liens, intervene and have their claims adjudicated and get any part of the proceeds, unless the contract for supplies, &c., was made within this state, and the boat at the time navigating this state. *James v. The Pawnee*, 19 Mo. R. 517. So I presume it would be as to the other contracts, and as to injuries specified in the act. Such proceedings do not look much like proceedings in admiralty, or proceedings *in rem*. See the opinion of this court in the case of *The Henrietta*, *ante*, page 284.

Be this as it may, I could not give to those proceedings the effect which is given to the proceedings strictly *in rem*. I am, therefore, of opinion that the material man, who has a lien under the general maritime law of the United States, has a right to enforce that lien by a suit in the United States court; and that the state law, and proceedings under it, given in evidence in this case, do not deprive him of that right. *The Barque Chusan*, 2 Story's Rep. 462; *Certain Logs of Mahogany*, 2 Sum. R. 592. But how is it with the material man who has no lien under the general maritime law, but has a lien under the state law?

308 DISTRICT COURT OF THE UNITED STATES.

Hill & Conn v. The Steamer Golden Gate.

The subject is not without its difficulties; but I think that as the lien is given by the state law, the state law may divest it. If he takes under the state law, he must hold under the state law. He takes his lien subject to all the provisions for divesting it contained in state laws passed anterior to his lien. He takes it *cum onere*. *Bronson v. Kenzie and another*, 1 How.R. 311; *The Barque Chusan*, 2 Story's R. 462. The statute which gives the lien—and which is the only law which gives him a lien—provides for certain judicial proceedings by which the vessel may be sold and the lien divested. The 13th section of the “act concerning boats and vessels” (Dig. Laws of Mo., 1845, 183), declares that, “when any boat or vessel shall be sold under the 11th section of this act, the officer making the sale shall execute to the purchaser a bill of sale therefor, and such boat or vessel shall, in the hands of the purchaser and his assigns, be free and discharged from all previous liens and claims under this act.”

What the law gave, the law hath taken away. The libelant cannot complain, his lien is divested by the same law and the same authority which gave it.

HILL, CONN *et al.*, Libelants v. THE STEAMER GOLDEN GATE.

District Court of the United States. District of Missouri. In Admiralty.

HON. R. W. WELLS, JUDGE.

1. Whether a vessel is a domestic or a foreign vessel depends, subject to some modifications and exceptions, upon the residence of her owners, not upon the port of her enrollment.
2. The lien against a vessel, in favor of material men under the general maritime law of the United States, also depends upon the residence of her owners, not upon the port of her enrollment.
3. When there is a charter party, and by its terms, the charterers are to have exclusive possession, control and management of the vessel, to appoint the master, run the vessel, and receive the entire profits, they, and not the general owners,

are to be deemed the owners, and are alone responsible for damages and contracts.

4. Thus, where a steamboat was owned in Indiana, enrolled in Kentucky, chartered by residents of St. Louis, Missouri, and contracted debts to residents of Missouri; *Held*, that under the general maritime law of the United States, the charterers and the material men both residing in Missouri there was no lien upon the vessel.
5. The act of Congress, entitled, "An act to provide for recording the conveyances of vessels, and for other purposes," (9 L. & B. 440), does not extend to charter parties.

John H. Rankin and *Wm. Biddlecome*, for libelant.

Geo. R. Shipley, for steamer.

WELLS, J.—The steamer *Golden Gate* was owned in Indiana, and enrolled at Louisville, Kentucky. The owners chartered her to certain persons who resided at St. Louis, Missouri. By the terms of the charter party the charterers were to have the boat for four months, with a privilege to renew the charter party, upon a specified notice, for four months more. The charterers were to pay the owners \$800 per month for the hire of the boat, and were to have the entire and exclusive control and management of her for the time specified; were to receive her earnings, and keep her clear of all liens and claims. The charterers appointed the master, ran the boat, and during the charter party contracted debts in Missouri for materials and supplies, a part of which were furnished by the libelants, and are the same for which the libels in this case are filed. Other libelants furnished materials and supplies before the boat was chartered.

The principal question for the court now to examine and decide is, have the libelants in this case a lien upon the boat by the general maritime law of the United States, for the materials and supplies thus furnished?

If materials and supplies be furnished to a vessel in a port of the state to which she belongs, the material men have no lien by the general maritime law; the presumption being that the supplies are furnished on the credit of the owners, and not on that of the boat. On the contrary, if the materials and supplies be furnished to a foreign vessel—that is a vessel belonging to a

foreign country or to another state—then a lien is given on the vessel by the general maritime law; the presumption being that the material men looked to the vessel as well as to the owners for security. There may be a lien on a vessel for materials and supplies furnished in a port of the state to which she belongs, but in such case it is given by the local law of the state. 1 Conkling's Ad. 56, and pages following. In regard to these principles there is no controversy.

The question whether the Golden Gate is subject to a lien by the general maritime law for supplies furnished in St. Louis, after the charter party was entered into, will depend for an answer on her being then in a foreign or domestic port. Does her being a foreign or domestic vessel depend on the residence of her owners, or on the port of her enrollment? As a general rule, which general rule, however, is subject to some modifications and exceptions, it depends on the residence of her owners or those who are, for the time, to be deemed and treated as her owners.

If it depends on the residence of her owners, then the next question will be, who are to be deemed and treated as her owners in this case? Are they the general owners residing in the state of Indiana, or the charterers residing in St. Louis, Missouri?

That the supreme and circuit courts of the United States look to the residence of the owners and not to the place of enrollment of a vessel to determine her character, will be apparent by examining the decided cases. The residence of the owners is proved and stated, and nothing is said about the enrollment. See the statement of the case and opinion in *The General Smith*, 4 Wheat. R. 438; *The Brig Nestor*, 1 Sumner's Rep. 75, where Judge STORY says: "*Prima facie* the supplies of material men to a foreign ship, that is to a ship belonging or represented to belong to owners residing in another state or country, are to be deemed to be furnished on the credit of the ship and the owners until the contrary is proved. Statement of the case and opinion in *Barque Chusan*, 2 Story's Rep. 456.

If the character of the vessel, foreign or domestic, depended on the enrollment and not on the residence of the owners, the statements and proof of the residence of owners, and the language of Judge STORY in the case of *The Brig Nestor*, were idle

and unimportant; and as nothing was said or proved about the enrollment, there could be nothing by which to determine the character of the vessel.

It is important to observe that the character of the vessel is only referred to for the purpose of ascertaining to whom and to what the credit is given; and in no other respect, so far as regards this case, is it important. If the owners reside in a foreign country or in another state, the material man is presumed to give credit to the boat and also to the owners; because he is presumed not to rely alone on the owners, who live so remote and who are beyond the jurisdiction of the courts of this state. If the owners reside in the same state with the material man, the latter can easily resort to them for payment, and readily enforce it in the courts; therefore he may well be supposed to give credit to the owners alone. It is apparent, therefore, that the place of enrollment has nothing to do with the credit that is given; and has, therefore, nothing to do with the question of lien.

If the material men were ignorant of the place of residence of the owners, they might presume, and I think the presumption would be reasonable, that the owners resided at or near the port where the vessel was enrolled; but in this case there is no room for presumption, as it is admitted that the libelants knew when the supplies were furnished, that the general owners resided in Indiana, and the charterers in St. Louis, and that the boat was enrolled at Louisville.

I am aware of the case of *Free v. Indiana*, Crabbe, 479, and that it decides that a vessel is to be deemed to belong to the port where she is enrolled. It is founded solely on the third section of the act of 31st December, 1792, entitled "An act concerning the registering and recording of ships or vessels," 1 Lit. & B. Laws U. S., 288. That section provides, "That every ship or vessel hereafter to be registered, except as hereinafter provided, shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong at the time of her registration, which port shall be deemed to be that, at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such ship or vessel, usually resides."

The substance of the section is that the vessel is to be registered at the port to which she belongs; and for the purpose of registry, the port to which she belongs shall be deemed to be that at which the owner resides, or the port nearest to which he resides. The section is only directing at what port the vessel is to be registered, and has no other effect. It frequently happens, as it happens in this case, that the owners reside in one state, and the port nearest to them is in another state—and this is especially the case on the Ohio and Mississippi rivers, which divide states. The above act relates to registering vessels—those engaged in foreign trade. But a subsequent act, February 18, 1793 (1 Lit. and B. 305, § 2), providing for the enrollment of vessels (those engaged in the coasting trade), expressly provides that the place of abode of the owners shall be stated in the enrollment.

According to the late and well considered case of *Dudley and others v. The Steamboat Superior*, American Law Register for August, 1855, which reviews the above case in Crabbe, the place of enrollment is only *prima facie* evidence of the port to which the vessel belongs. See also *Sharp v. United Ins. Co.*, 14 Johns. R. 201; and *Leonard v. Huntington*, 15 Johns. R. 302. It will be observed that when the port or place to which a vessel belongs is spoken of, it always means the port or place where the owners reside to whom the vessel belongs.

I have before remarked in this opinion, that the rule that a foreign vessel was subject to a lien for supplies, and that a domestic vessel was not thus subject, under the general maritime law, was not without exceptions and modifications; but it will be seen that those exceptions and modifications all show that the lien depends on the residence, or supposed residence, of the owners, and not on the place of enrollment. Thus, if the owners of a domestic vessel held out their vessel as a foreign vessel—that is, as belonging to persons residing in a foreign country—they are precluded by their own act from denying her foreign character, when libeled by material men; and there will be a lien for the supplies furnished, enforced in the admiralty. *The St. Jago de Cuba*, 9 Wheat. R. 416, 417.

Again: if an exclusive credit be given to the master, there

is no lien, although she be a foreign vessel. *The Brig Nestor*, 1 Sumner's Rep. 75.

Again : if the contract be made with the owners personally and not with the master, there is no lien—the presumption being that the credit was given to the owners personally, and not on the credit of the vessel. *The St. Jago de Cuba*, *supra*.

The act of Congress of the 3d of March, 1851 (9 Lit. and B. 685), entitled, "An act to limit the liability of ship owners and for other purposes," section 5 provides, "That the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel, within the meaning of this act ; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof."

The above section applies, I presume, only to certain losses and injuries specified in the act, and moreover is declared not to apply to inland or river navigation ; the last, as I suppose, was because the general maritime law of the United States was not at that time, March, 1851, thought to apply to the inland navigation, the decision of the Supreme Court of the United States declaring it to extend to inland navigation, not having, at that time, been made. But it applies in many cases, and to all navigation except the inland navigation ; and shows that the place of enrollment can have nothing to do with it. And so far as the act provides, it shows the opinion of Congress that the charterers are to be, and ought to be, considered the owners.

Having established, as I think, the proposition that the lien in favor of material men under the general maritime law, depends on the residence of the owners, and not on the place of enrollment, it becomes necessary to inquire who, in this case, are to be deemed the owners.

The law, I think, is perfectly well settled, that where there is a charter party, and by its terms the charterers, as in this case, are to have exclusive possession, control and management of the vessel during the term specified—are to appoint the master, run the vessel, and receive the entire profits—they, and not the general owners, are to be deemed the owners, and are alone re-

sponsible for damages and contracts. *Gracie v. Palmer*, 8 Wheaton's R. 632, 633; *MacCardier v. The Chesapeake Ins. Co.*, 8 Cranch's R. 39; Abbott on Shipping, note 1 to page 57 of the English edition, and cases there cited; *Ibid*, 288, 289, same paging and note; *The Schooner Volunteer and cargo*, 1 Sumner's Rep. 566, 567; *Kleine v. Catara*, 2 Gallison's Rep. 75. Indeed, upon principle as well as authority, there cannot be a doubt. It might as well be contended that if you hire your horse to another to perform a journey, you, and not he, would be responsible for his shoeing and food.

It was said in the argument of this cause, that the charter party was not recorded. This can make no difference, as the only effect of recording would be to give notice of its existence—there being no act of Congress declaring it to be void for want of recording, and the material men expressly admitting that they knew of the charter party when they furnished the supplies. Abbott on Shipping, page 33 of English Ed. and note 1 to that page, and cases there cited. There is an act of Congress (9 Lit. and B. 440), entitled "An act to provide for recording the conveyances of vessels, and for other purposes." But it does not extend to charter parties; and the instruments which the act requires to be recorded, are not declared invalid as to those having actual notice thereof.

I come, therefore, to the conclusion, that for supplies furnished the Golden Gate at St. Louis, after she was chartered, the material men and the charterers both residing there at the time, there is no lien upon the vessel by the general maritime laws of the United States.

EASTERN DISTRICT OF LOUISIANA.

DECISIONS

OF THE

HON. THEO. H. McCALEB, JUDGE.

District Court of the United States. Fifth Judicial Circuit. District of Louisiana. New Orleans, November 3d, 1845.

HON. THEODORE H. McCALEB, PRESIDING.

On the opening of the court, this morning, at 10 o'clock, A. M., *E. Warren Moise, Esq.*, rose, and after a few eloquent and appropriate remarks, moved an adjournment of the court, as a tribute of respect to the memory of the late Mr. Justice STORY. This motion was seconded by *C. Roselius, Esq.*, late attorney-general of this state. In granting the motion, his honor, Judge McCALEB, made the following remarks:

In yielding, as I do, a ready compliance with the motion which has just been made, I shall, I trust, be excused for making a few remarks.

I am not so presumptuous as to imagine that I can add anything to the praise so justly merited, which has already been bestowed upon the character of him whose memory it is the object of the motion to honor. The duty of portraying the character and recounting the services of Mr. Justice STORY, has already devolved upon those who, from intellectual superiority and from long personal acquaintance with his character, were peculiarly well qualified to perform it. It is my wish, simply, that on the present occasion the sentiments of admiration

In Memory of Mr. Justice Story.

and gratitude for the long and signal services of the great jurist, expressed in such eloquent and pathetic terms by his immediate neighbors and friends, may find in our bosoms a cordial response. Though far from the scene of his active and zealous efforts to advance the great interests of the science in which he was long known and recognized as one of the ablest preceptors, we have, as Americans, been equally sharers in the benefits which his unequalled labors have diffused over our vast Union.

It is peculiarly fit and proper that the bench and the bar throughout our widely extended country, should do honor to the memory of Mr. Justice STORY. They are daily and hourly constrained to acknowledge the obligations under which he has placed them, by the prodigal liberality with which he has everywhere dispensed the inexhaustible treasure of his great intellect; and it is impossible for those of us who are called to minister at the altar of Justice, within the range of federal jurisdiction, adequately to express the gratitude we must ever feel for the benefits which his matchless assiduity through a long life, has conferred on every branch of legal science. It is a source of pride to us as Americans, to know that his opinions are cited as authority before the highest common law tribunals of England. He has long since, in admiralty law, taken his place with STOWELL, TENTERDEN and ROBINSON, who have shed so much light upon this particular branch of jurisprudence. As a chancellor, he will descend to posterity in the "glorious company" of a LOUGHBOROUGH, an ELDEN, a COTTENHAM, a BROUGHAM and a LYNTHURST—eminent among all, inferior to none. While we express the solemn conviction that his place cannot soon be supplied, even from our widely extended country, rich as it may be, and as it undoubtedly is in intellectual greatness and legal learning, let us hope that those who are called to minister at the altars of Justice, while they cannot expect to equal him in his comet-like velocity, will strive at least to imbibe his wisdom and follow in the luminous "track of his fiery car."

While, however, we award honors so justly due to the memory of this distinguished jurist, we should beware lest our regret for his sudden loss should betray us into unjust comparisons; and I trust it will not be deemed inconsistent with the occasion, but on

the contrary as a simple act of justice, if I express my dissent from the opinion of one(1) who has written an eloquent and, I think, except in one important particular, a just eulogium on the life and services of him whom we now honor. That opinion elevates the judicial character of Mr. Justice STORY above that of the late venerable Chief Justice MARSHALL. They were, we know, for many years associates on the bench of the Supreme Court of the United States, and I think it may be safely asserted that the latter was universally acknowledged to be without an equal in this country. The industry and research of the former have long been proverbial, and so far as relates to these attributes, so essential to a magistrate, he doubtless excelled his illustrious and venerable friend. But in the development of great principles, in a lucid and systematic arrangement of an argument by which error is most clearly exposed or truth most easily discerned, in all the qualities which distinguish the sound logician, the latter still stands pre-eminent among the great legal names of our country. We are told by the elegant author of the *Decline and Fall of the Roman Empire*, that "an indulgent edict of the younger Theodosius excused the judge from the labor of comparing and weighing discordant arguments of jurists, who, in the age of the Antonines disclaimed the authority of a master and adopted from every system the most probable doctrine. Five civilians, CAIUS, PAPINIAN, PAULUS, ULPIAN and MODESTINUS, were established as the oracles of jurisprudence. A majority was decisive; but if their opinions were equally decided, a casting vote was ascribed to the superior wisdom of PAPINIAN." There are few American jurists who, when impeded and embarrassed by discordant authorities, do not feel irresistibly inclined to turn with the like veneration to the opinions of MARSHALL. Though gone from the stage of action, he is yet, and would that he could continue to be through all time, regarded as the PAPINIAN of American constitutional law. Even in those cases in which he felt compelled to differ in opinion with a majority of his brethren of the bench, there are few I believe who,

(1) Mr. Sumner, author of remarks on the funeral of Mr. Justice STORY, published in the October number of the *Law Reporter*.

518 DISTRICT COURT OF THE UNITED STATES.

In Memory of Mr. Justice Story.

upon an attentive and impartial examination of the comparative strength of the reasons advanced for and against the propositions upon which a difference has arisen, are not forced to the conclusion that truth, justice and law have been compelled to yield to the power and authority of numbers. It is in such cases, when the opinion of the majority is cited as law, and the opinion of the minority is necessarily to be treated as error, that we are led to sympathize with the great Roman orator when, under the influence of his enthusiastic admiration of the Athenian philosopher, he exclaimed, "*Errare malo cum Platone, quam cum istis vera sentire.*"

Happily, however, through a long judicial career there was no material conflict of opinion between MARSHALL and STORY. And although we are constrained to acknowledge that "one star is greater than another star in glory," let us be thankful that two such orbs were so long permitted to reign "lords of the ascendant" in our American firmament. Let us be thankful that we have hitherto been guided by examples so pure and by wisdom so unerring. Let us continue to pursue with alacrity and pride a noble profession adorned by such venerable names. Let us yield an unreluctant homage to the majesty of LAW, and ever feel with the eloquent Hooker, that "her seat is the bosom of God and her voice the harmony of the world."

Upon the conclusion of the above remarks from the judge, Isaac T. Preston, Esq., attorney-general of the state, moved that the motion made by Mr. Moise, with the accompanying remarks of the judge, be spread upon the record, and that the same be published. The court then immediately adjourned until to-morrow morning, at 10 o'clock, A. M.

TRIBUTE OF RESPECT TO THE MEMORY OF THE LATE HON. S. S.
PRENTISS.

At the opening of the United States District Court yesterday morning, being its first meeting since the adjournment in July last, the following highly interesting proceedings were had. *Mr. Hunton*, the district attorney of the United States, rose and addressed the court as follows :

May it please the court—Since your adjournment in July, a distinguished member of the bar, has terminated his earthly career, has been summoned from this to a higher tribunal; and at a meeting of the members of the bar of New Orleans, on the occasion of his death, resolutions were adopted expressing regret and sorrow for his loss, and admiration for him as a man and a lawyer.

I have been requested to present these resolutions, and to ask that they be inscribed on the records of the court, which I now do.

It is not my purpose to pronounce a eulogy on Sargeant S. Prentiss: neither the time, nor the place, nor the occasion is, in my judgment, appropriate for such a proceeding; and I regret that expectations have been excited that such a purpose was entertained.

Under other circumstances, it would give me mournful pleasure to trace the brilliant career of that extraordinary man, from the time when he arrived in Mississippi, the poor, friendless, stranger boy, till the period of his death; to delineate his character; to tell how, at a single leap, he bounded from obscurity to renown, from the very foot to the topmost round of the ladder of fame; and to show how, by his indomitable spirit and mighty mind, he was enabled to maintain, against all competitors, that proud position so suddenly, yet so honorably won.

His was a life of constant struggles, and of action. He was always engaged in the heat and dust of professional or political efforts. In these efforts, he, perhaps, sometimes indulged in unwarrantable invective and bitterness, yet I believe all who knew him will bear testimony with me, that after the excitement of debate was over, he had no memory for anything he had uttered against his adversary; he bore no malice; indeed his breast was filled with the milk of human kindness; he was generous to his foes, faithful to his friends, and devoted to his clients; he made their cause his own.

He had an ardent and fiery temperament, yet there was a singular blandness and amenity of deportment about this remarkable man, that won for him the confidence and affection of all who knew him intimately.

He came among us here with a reputation as a popular orator, almost unequaled in the southwest. His fame as an advocate had extended all over the republic; his claims, however, to high rank as a lawyer were questioned and contested, yet he very soon gave unerring proofs that he was not only the brilliant advocate, but was a sound, acute and discriminating lawyer; his reputation as such was advancing with steady progress—he was widening and deepening the foundations of his legal learn-

§20 DISTRICT COURT OF THE UNITED STATES.

Tribute of Respect to the Memory of the late Hon. S. S. Prentiss.

ing. Rich imaginative faculties, with high intellectual endowments of solid order, were united in the mind of Mr. Prentiss in a higher degree than I have ever known in any other man.

Of his social qualities, his sparkling wit, his humor, his unchanging cheerfulness, I forbear to speak. His eloquent voice will no more be heard, his bright face will no more be seen in these halls. When such a man dies, it is meet and proper that we pause for an instant, and take note of the event. I therefore move that these resolutions be placed on the enduring records of the court.

Judge McCaleb ordered the resolutions to be recorded, and thus addressed the members of the bar :

In granting the motion just made by the district attorney, I shall be excused, I trust, if I embrace the occasion to make a few remarks.

Amid the painful regrets we experience at the loss of Mr. Prentiss, we can still dwell with a melancholy pleasure upon his many noble qualities of head and heart. As the learned, able and eloquent advocate, he was at all times the object of our warmest admiration ; as the kind and confiding friend, the honorable and chivalric gentleman, he had secured our affectionate and lasting regards. In our sorrowful reflections upon his departure from the active scenes of life, we can truly say, that a lawyer of extensive and profound acquirements, an orator of rare powers of argumentation and of most brilliant fancy, a man of unsullied honor, a patriot of ardent devotion and undaunted courage, and a friend whose generosity knew no bounds, has prematurely passed from the theatre of his usefulness and his fame.

The intellectual endowments of Mr. Prentiss presented a remarkable example, in which great logical powers and the most vivid imagination were happily blended. With all his readiness in debate, he never failed when an opportunity offered, to enter into the most laborious investigations to obtain the mastery of a subject. If he frequently sought to amuse, he rarely failed at the same time to instruct an audience. The rapidity with which he seized the strong points of a case, added to his untiring assiduity, rendered him at all times a most formidable adversary.

In happy exhibitions of extemporaneous eloquence—in striking illustrations by a rapid and harmonious succession of brilliant metaphors, he was rarely, if ever, excelled. But those who regarded him as a merely eloquent declaimer, were widely mistaken in their estimate of his powers. His honorable zeal in the assertion of the rights of a client, his high professional pride, his respect for an adversary and the court, prompted him, in all cases of importance, to a diligent and careful preparation. His own wonderful powers of illustration were at all times supported by the solemn mandates of authority ; and the facility with which he was wont to call to his aid the thoughts or effusions of others, proves him to have been a student of an extraordinary memory, and of unremitting diligence. His ideas of intellectual excellence were formed by an attentive study of the best models ; and those who enjoyed with him the pleasures of social intercourse, are aware with what humility and veneration he paid his devotions at the shrine of ancient genius. No man with all his admiration of modern excellence, was more prompt in according superiority to those master spirits of antiquity whom modern genius, with all its boasted progress, has yet signally failed to outstrip in the race of true greatness and glory.

Tribute of Respect to the Memory of the late Hon. S. S. Prentiss.

It was in 1845 that Mr. Prentiss removed from the state of Mississippi to this city, with the view to a permanent residence among us, and for the purpose of pursuing the practice of his profession. He came with a brilliant reputation as a lawyer and an orator, and I think it will be admitted by every candid mind, that the public voice in other sections of the Union had not been extravagant in its estimate of his abilities. His almost unprecedented success as an advocate before the tribunals of Mississippi; his eloquent efforts in the political arena, before large popular assemblages in different parts of the country, and in the hall of the House of Representatives of the United States, had gained him universal applause, and indisputably established his claims to the possession of talents of the highest order. It was my good fortune to be present at the capitol at Washington in 1838, during the long and exciting debate which arose out of the Mississippi contested election. The most prominent champions who entered the lists on that interesting occasion, were Mr. Prentiss himself, then claiming his seat, and Mr. Legare, the distinguished jurist and scholar from South Carolina. It is neither my province nor desire to decide to whom belonged the chaplet of victory. It is sufficient to say that the powerful and brilliant efforts of Mr. Prentiss in defence of his trying and important position as challenger of all comers, received the most enthusiastic encomiums from political friends and foes; and I take pleasure in testifying that from none did I hear a more unqualified expression of approbation than was given to me subsequently, in a social interview, by the generous and accomplished antagonist to whom I have alluded.

The speech of Mr. Prentiss, on that occasion, was published in the journals of the day, and is among the very few of his remarkable exhibitions of argument and oratory remaining for the admiration of posterity.

We are told by Macauley, in his elegant Review of the Writings of Sir William Temple, that "of the parliamentary eloquence of the celebrated rivals (Shaftesbury and Halifax), we can judge *only by report*." * * * "Halifax is described by Dryden as

'Of piercing wit and pregnant thought,
Endowed by nature, and by learning taught
To move assemblies.'

Yet his oratory is utterly and irretrievably lost to us, like that of Somers, of Bolingbroke, of Charles Townshend—of many others, who were accustomed to rise amidst the breathless expectation of senates, and to sit down amidst reiterated bursts of applause. Old men, who had lived to admire the eloquence of Poultney, in its meridian, and that of Pitt in its splendid dawn, still murmured that they had heard nothing like the great speeches of Lord Halifax on the Exclusion Bill." These observations on what must ever be regarded as most important omissions in the annals of parliamentary and forensic eloquence in England, remind us forcibly of similar omissions in our own history—omissions the more to be regretted because they deprive us forever, as in the case of our lamented friend, of the noble sentiments luminously arrayed, of those with whom for years we have daily enjoyed the delights of social intercourse.

In the case of Mr. Prentiss, the omission is the more unaccountable, and perhaps the more unpardonable, because of the great advantages he possessed of a finished education, and of his extraordinary readiness as a writer as well as a speaker. It

322 DISTRICT COURT OF THE UNITED STATES.

Tribute of Respect to the Memory of the late Hon. S. S. Prentiss.

was indeed a source of regret among his countless admirers, that with all his professional pride, with all his aspirations for professional distinction, and all his ambition for victory in the political arena, he should have manifested such utter indifference to posthumous fame. He was sensitive in everything relating to his character as an honorable man; he was careful to preserve untarnished the fair escutcheon of an honorable name; yet in the great intellectual conflicts in which he was so frequently engaged, he was content with the cotemporary applause so bountifully bestowed, and looked no further. Posterity, indeed, will never be able to appreciate his intrinsic worth; but his powerful logic, his brilliant wit, the radiant corruscations of his fancy, his keen sarcasm and his melting pathos will be treasured in the grateful recollections of those who were permitted to witness their effect. They will long be remembered as the

*Fruits of a genial morn and glorious noon,
A deathless part of him who died too soon.*

I have alluded to the professional pride of Mr. Prentiss. No man regarded with more profound veneration the luminaries of the law, and no man was more emulous of their triumphs. He felt that the science itself presented the noblest field for the exertion of the intellectual faculties, and was deeply sensible of the high responsibilities assumed by all who embark in it as a means of acquiring a livelihood. He treated with scorn the vulgar prejudices against it, founded upon the faults or delinquencies of its unworthy members. It was the profession which, in his opinion, furnished the materials to form the statesman. It was the profession from which the patriot could provide the most efficient weapons to vindicate the freedom and honor of his country. The boldest and most devoted champions of popular liberty, in every civilized age, and every civilized clime, were, in his opinion, to be found in the ranks of the legal profession. He believed that in our own country they afforded one of the strongest bonds of our National Union. His sentiments on this subject were delivered with characteristic energy and zeal, and were suggested by the invitation with which he had been honored by the Law Association of Harvard University, to deliver the address at its annual celebration. I can never forget the feelings of gratified pride he expressed on the reception of that invitation, or the emotions of regret he betrayed at being compelled, by his feeble health, to decline it. Had his physical strength been adequate to the task, Petrarch in the solitudes of Vacluse, never responded with a prouder enthusiasm to the summons from the metropolis of the world, to receive in his capitol and from the hands of a senator of Rome, the laurel crown as the reward of poetic merit, than would our gifted orator have obeyed the request of the members of his noble profession in that ancient university. But the triumph of Petrarch was not reserved for our friend. His melancholy fate more solemnly reminds us of that other devoted child of Italian song, who had "poured his spirit over Palestine," and whose summons to the honors of the laurel wreath, was but a summons to his grave.

We feel that it was but yesterday we beheld our friend here in this hall, in the ardent and energetic discharge of his professional duties, with a countenance pale and emaciated, but radiant with the fire of genius, with a frame feeble and exhausted from the cruel ravages of disease, but with a spirit undaunted, a mind ever luminous, and exhibiting in every effort its almost superhuman energy. His mighty soul

Charge to the Grand Jury.

seemed "swelling beyond the measure of the chains" that bound it within its frail tenement. His surrender at last to the King of Terrors, was the result of another victory of genius over a favorite son, and forcibly recalls the lines of the poet, in allusion to the death of a kindred spirit:

"'Twas thine own genius gave the final blow,
And helped to plant the wound that laid thee low;
So the struck eagle stretched upon the plain
No more through rolling clouds to soar again,
Viewed his own feather in the fatal dart,
And winged the shaft that quivered in his heart."

Amid the excitement of the forum he was unconscious of the rapid decay of the organs of life. Heedless alike of the solemn admonitions of friends and the increasing debility of an overtaken and broken constitution, he continued, day after day, to redouble his exertions, and seemed to regulate his physical action by the mighty energies of a mind that scorned all sympathy with the feeble frame on which it was dependent for support. One of the most important arguments made by him before this tribunal, I allude to that in the case of the heirs of *Poultney v. The City of Lafayette*, was delivered from his seat, his declining health rendering it impossible for him to stand in the presence of the court; and yet, I may with confidence appeal to his able and generous antagonist on that occasion, to bear testimony to the systematic arrangement and masterly ability with which every argument, and all the learning that could tend to the elucidation of the important questions involved, were presented to the court.

I have thus, gentlemen of the bar, in a manner perhaps somewhat unusual, though I trust not inappropriate to the occasion, availed myself of the opportunity afforded by the presentation of your eloquent resolutions, to mingle my own feeble voice with the strains of eulogy which have already been heard, in heartfelt tributes to private and public worth; to add my own humble offering at the shrine of Genius; to hang my own garland of sorrow over the tomb of a long cherished friend.

To mourn the vanished beam—and add my mite
Of praise, in payment of a long delight.

CHARGE TO THE GRAND JURY OF THE DISTRICT COURT OF THE
UNITED STATES,

For the Eastern District of Louisiana. November Term, 1846.

HON. THEO. H. MCCALED, JUDGE.

Gentlemen of the Grand Jury:—I deem it my duty to call your serious attention to the provisions of the act of Congress or

324 DISTRICT COURT OF THE UNITED STATES.

Charge to the Grand Jury.

1888, relating to "the better security of lives of passengers on board of vessels propelled in whole or in part by steam." To give you a clear understanding of your duty under that act of Congress it will be necessary for me to notice briefly its requirements, and to direct your attention particularly to the offences which come within the criminal jurisdiction of this court, and towards which, therefore, your inquiries are to be solemnly directed.

The first section of the act requiring a new enrollment and license, it is not necessary at this time to consider.

The second section declares that it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any merchandise or passengers upon the navigable waters of the United States, after the 1st of October, 1888, without having first obtained from the proper officer, a license under the existing laws, and without having complied with the conditions imposed by this act; and for every violation of this section, the owner of the vessel shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer; and for this sum the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offence.

The third section of this act makes it the duty of the district judge of the United States, within whose district any ports of entry or delivery may be on the navigable waters, bays, lakes and rivers of the United States, upon the application of the master or owner of any steamboat or vessel propelled in whole or in part by steam, to appoint from time to time, one or more persons skilled and competent to make inspections of such boats and vessels, and of the boilers and machinery employed in the same, who shall not be interested in the manufacture of steam engines, steamboat boilers or other machinery belonging to steam vessels, whose duty it shall be to make such inspection when called upon for that purpose, and to give to the owner or master of such boat or vessel duplicate certificates of such inspection; such persons before entering upon the duties enjoined

Charge to the Grand Jury.

by this act, are to take an oath well, faithfully and impartially to execute and perform the services herein required of them:

The fourth section provides that the person or persons called upon to inspect the hull of a steamboat under the provisions of this act, shall after a thorough examination, give to the owner or master, a certificate in which shall be stated the age of the boat, when and where originally built, and the length of time the same had been running. The inspectors must also state whether in their opinion the boat is sound, and in all respects seaworthy, and fit to be used for the transportation of freight or passengers.

The fifth section requires the inspectors to state in the certificate, after a thorough examination of the boilers and machinery, whether the same be sound and fit for use, and also the age of the boilers. Duplicates of these certificates are to be granted, one of which is to be posted up in some conspicuous part of the boat for the information of the public.

The sixth section makes it the duty of the owners and masters of steamboats to cause the inspection provided under the fourth section, that is to say the inspection of the hulls of steamboats, to be made at least once in every twelve months; and the examination required by the fifth section, that is to say the examination of the boilers and the machinery, to be made at least once in every six months. And they are to deliver to the collector or surveyor of the port where their boats have been enrolled or licensed, the certificate of such inspection; and on failure thereof they are to forfeit the licenses and be subject to the same penalty as though they had run their boat without a license, to be recovered in like manner.

And it is moreover the duty of owners and masters of steamboats licensed in pursuance of this act, to employ on board their respective boats a competent number of experienced and skillful engineers, and in case of neglect to do so they shall be held responsible for all damages to the property of any passenger of any boat, occasioned by an explosion of the boiler or any derangement of the engine or machinery of any boat.

The seventh section declares that whenever the master of any steamboat, or person charged with navigating said boat, shall stop the motion or headway of said boat, or when she shall be stop-

326 DISTRICT COURT OF THE UNITED STATES.

Charge to the Grand Jury.

ped for the purpose of discharging or taking in cargo, fuel or passengers, he shall open the safety valve, so as to keep the steam down in the boiler as near as practicable to what it is when the boat is under headway, under the penalty of two hundred dollars for each and every offence.

I pass over the eighth and ninth sections, which relate more immediately to the navigation of the northern lakes or the high seas.

The tenth section makes it the duty of the master and owner of every steamboat running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars.

The eleventh section provides that the penalties imposed by this act, may be recovered in the name of the United States, in the District or Circuit Court of such district or circuit where the offence shall have been committed, or in which the owner or master of said vessel may reside, one-half to the use of the informer, and the other to the use of the United States; or the said penalties may be prosecuted for by indictment in either of the said courts.

This last clause in the section, then, shows plainly the duty that devolves upon you as the grand inquest of this district. You are diligently to inquire and true presentment make of all such captains or owners of steamboats who may be found acting in defiance of the requirements of the law.

But it is to the twelfth section of this act that I desire to direct your most serious and solemn attention on the present occasion. It provides that every captain, engineer, pilot or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose *misconduct, negligence or inattention* to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, *shall be deemed guilty of manslaughter*, and, upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years. The frequent loss of human life in consequence of explosions of the boilers of steamboats, of collisions and the burning of steamboats on our western waters, and especially on the Mis-

Charge to the Grand Jury.

Mississippi river, imposes upon you the solemn duty of diligently inquiring into every case that may be brought before you or that may come under your cognizance. The strong arm of the law must be interposed to put an end if possible to these terrible disasters. The frightful loss of life and property annually sustained by our community from such causes, demands the utmost vigilance on the part of all who have any agency in the administration of criminal justice before this tribunal. The legislation of Congress calls for prompt and energetic action. That legislation is wise and salutary. You have seen from the details through which we have gone, the solicitude exhibited by Congress to prescribe every rule and regulation that was best calculated to insure security to life and property. This legislation was dictated by humanity, and it is to be hoped that no mawkish sensibility, no false notions of clemency may be interposed to screen those who may be shown to have been guilty of a violation of the law. There is a disposition in the public mind to take any representation having the semblance of plausibility as sufficient to exculpate an offender. There is a disposition to inquire whether wicked motives may have prompted the commission of the act, and in the absence of all supposed malice to conclude that there can be no guilt. The law, however, looks to the *consequences of the act*, and is utterly regardless of the *purpose* that may have prompted its commission. I wish you, gentlemen, to bear in mind that the twelfth section of the act of Congress has nothing to do with the motives. It was designed to punish the captains, engineers and pilots of steamboats for their negligence or inattention. Whether there be malice or not, is a question which cannot be a subject of inquiry under the law. We may admit what doubtless generally is the fact, that when a boiler explodes or a collision takes place, there was no malice on the part of the officer of the boat, through whose negligence or inattention it occurred; still, if there be evidence to show that *negligence* or *inattention*, the officer is guilty in the eye of the law. We are not driven to the English common law to find out what constitutes manslaughter. The statute itself contains the definition of the crime, and it is unnecessary to look beyond it. That statute virtually says to the officers of steamboats who assume

328 DISTRICT COURT OF THE UNITED STATES.

Charge to the Grand Jury.

the solemn responsibility of transporting persons and property from one port to another : You shall attend strictly to the duty which you have, for a valuable consideration, assumed to perform. You shall observe abundant caution ; you shall take all proper care that no disaster occurs which may result in the loss of life. It imposes upon the owners of steamboats the duty of employing intelligent and prudent captains. It imposes upon captains the duty of employing skillful, sober, prudent and attentive pilots and engineers. There is too much reason to believe that there has hitherto been a shameful remissness on the part of both owners and captains generally, in the performance of this duty ; and those who from parsimonious motives have failed in their duty to the public, should be promptly made to feel the consequences of their criminal cupidity and their indifference to the rights of others. The only manner pointed out by the law by which owners can be made to suffer is by civil action for damages, as set forth in the last section of the act.

Gentlemen of the Grand Jury, it is in vain that the prosecuting officer of the government discharges his duty if *you* be not fully alive to the responsibility imposed upon you. Vigilance on your part will create a corresponding vigilance on the part of those against whose negligence and inattention the penalties of the law have been denounced. Let us hope that a salutary influence will be exerted by prompt and energetic action. Let us hope that the time will speedily come when there will be in the navigation of the Mississippi and her tributaries the same security to life and property which is enjoyed in other parts of the world. Let us hope that the time may soon come when we shall cease to have occasion to regard the stupendous invention of our great countryman, Fulton, which has created such important revolutions in the commerce of the world, in any other light than as a *blessing* to mankind. To bring about this happy realization of our hopes, the officers of the law must be vigilant, the courts must be vigilant, the juries must do their duty firmly, fearlessly, regardless of all consequences. In a word, the wise, humane and salutary enactments of Congress must be respected and enforced without fear or favor.

MICHAEL EVANS *et al.*, Libelants, and S. PETERSON *et al.* and
JOSEPH CLARKE *et al.*, Interveners v. THE SHIP CHARLES and
THE MERCHANTS' INS. Co., Respondents and Claimants.

District Court of the United States. Eastern District of Louisiana.
In Admiralty.

HON. THEO. H. McCaleb, JUDGE.

1. Where a vessel is found entirely deserted or abandoned at sea, she is, in the sense of the maritime law, a derelict.
2. A salvor is a person who without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing covenant, that connected him with the duty of employing himself for the preservation of that ship.
3. The owners of the saving vessel are clearly entitled to be paid a proportion of the amount awarded by the court as salvage compensation; and *one-third* is the proportion usually awarded to such owners because of the risk and danger to which their property is exposed in the performance of the salvage service.
4. In cases of salvage, a court of admiralty will not indulge mere possible conjectures. If the fact that the vessel has been saved be clear, the presumption that she might otherwise have been saved is mere matter of conjecture *in nubibus*. Salvors are not to be driven out of court upon the suggestion that if they had not touched a derelict ship and cargo, the latter might, in some possible way, have been saved from all calamity, and therefore that the salvors have little or no merit.
5. It has been customary to award a *moiety* in cases of derelict, but the rule is by no means *inflexible*, and courts of admiralty, both in England and America, have been governed in their decrees, by the peculiar circumstances of each particular case.
6. Where some of the salvors decline asserting a claim for salvage compensation, their proportion will not accrue to the benefit of either their co-salvors or to the owners of the saving vessel.
7. In salvage cases, which are frequently of great importance, and where propositions of compromise are often ambiguously made, and often liable to misconception, the admiralty court in England disregards all tenders, except those formally made by acts of court. It is not known that this doctrine has been adopted by the courts of the United States; but the general practice is in salvage cases, to make tenders by formal acts of court, which are legal memoranda of the nature of pleas.

J. T. Preston and C. Roselius, proctors for libelants.

J. P. Benjamin, for respondents.

MCCALEB, J.—This is a libel for salvage against the ship Charles, found derelict at sea, on the 4th of June last, about eighteen miles from South Point light-house, at the Balize, by the captain of the tow-boat Tiger. At the time she was discovered, she had all her sails set, and was apparently standing in towards the Balize. She had on board a cargo of lumber and staves, but was entirely abandoned. It appears that she left this port about the first of June last, under the command of a Captain Gorham, bound for the port of Bordeaux in France: that she had proceeded on her voyage about forty miles from the Balize, when she was abandoned by the master, crew and passengers under the belief that she was sinking. The ship Louis Quatorze was sailing within a short distance of the Charles, at the time the determination to desert the latter was formed, and a signal being given, the master of the Louis Quatorze went to the assistance of the passengers on board the Charles and received them all on his own vessel. The master and crew of the Charles afterwards hailed and got on board a vessel bound to the port of Charleston; and the passengers pursued their voyage to France. With the ill-grounded apprehensions which led to the abandonment of the vessel to the mercy of the winds and waves, without a single human being on board, I have fortunately, so far as Capt. Gorham and his crew are concerned, nothing to do in passing an opinion upon the merits of the case; and I willingly take leave of this part of the evidence with the single remark that there seems to be not the slightest justification for the course of conduct they pursued. For, admitting that the vessel was making water and was thus rendered unseaworthy and insufficient to encounter the dangers of so long a voyage, it is yet fully established by the testimony of several intelligent and respectable witnesses, whose knowledge of nautical affairs cannot be questioned, that it was not only not probable, but not possible for the ship to have *gone down* with such a cargo as she then had on board. The plain, nay, the only course which honesty and the most ordinary knowledge of nautical affairs would have suggested, was to return immediately to the port of departure, where the vessel could have been refitted and again dispatched upon her voyage.

Capt. Kroll of the tow-boat Tiger, which went to the relief of

the derelict vessel, states that on hailing her and seeing no one on board, he ordered the crew of the tow-boat to go on board of her and examine her hold and cabin : that they refused to go, but that Mr. Clarke, the pilot, finally complied with his request, and found upon examination that the baggage of the passengers and crew, as well as the bedding, had been removed, and that everything had been taken out of her except a small quantity of stores, and the cargo of staves and lumber, which has already been mentioned. The captain of the Tiger proceeds to say, that believing that the crew and passengers had either deserted her from apprehensions that she was sinking (his pilot having reported that she had thirty inches of water in her hold), or had been taken by pirates, he looked in every direction to see if he could find anything which could solve the doubts which hung upon his mind, and finally descried a small boat, which he immediately approached and found on board of it a dog. After cruising about in different directions for two or three hours, he returned to the Charles and took her in tow : that in returning to the Balize he encountered a severe gale, which lasted three-quarters of an hour. This gale, he thinks, would have driven the Charles ashore about 9 or 10 o'clock that night, had she not been relieved. He states that he was engaged forty-eight hours in towing her with two other vessels up to the city : that he hired six hands on board the ship Powhattan to go on board of her and pump her ; and that these hands were engaged one-third of the time in working one pump. The reason that he employed the hands on board the Powhattan, was the positive refusal on the part of the crew of the tow-boat Tiger to have anything to do with the Charles. They declined in the first instance, to go on board of her to examine her, and refused to pump her, because they said they were not paid for pumping out other ships or vessels than the one upon which they were employed. According to the testimony of Captain Kroll, it appears that the crew of the tow-boat Tiger did nothing but their ordinary duties on board their own vessel, which is employed in towing vessels from the sea up to this port : that all the assistance he received, in saving the Charles, was derived from the meritorious exertions of his pilot, Mr. Clarke, the six men hired on board the Pow-

battan, and two other men whose names are not given and not remembered either by himself or Mr. Clarké, who was also examined as a witness on behalf of the intervening libelants, Clark, Grant and others, owners of the tow-boat Tiger. There is not a tittle of evidence to show whether or not these two men are of the number of the crew who appear as the original libelants.

The testimony of Clarke, the pilot, coincides almost entirely with that of Captain Kroll, and especially with that part of it which relates to the refusal of the crew of the tow-boat, to aid in rendering relief to the Charles. They both say that the service they themselves rendered the derelict ship, was performed in the regular discharge of their accustomed duties, in towing vessels from the sea to this port, and they modestly refuse to receive any extra compensation, or to assert any claim for salvage. They also state that the tow boat was subjected to an inconsiderable delay by the service rendered to the Charles, and that they were not prevented from bringing up other vessels as usual.

From a candid and impartial view of this testimony, I have no difficulty in coming to the conclusion, that the claim of the original libelants for salvage, should be dismissed. They have not only failed to show that they have rendered any service out of the line of their regular duty, as the crew of the tow-boat Tiger, but it is very clear from the testimony given, which is entirely disinterested, that they refused to render the very service for which they now demand a salvage compensation. The same must be said of the claim of the intervening libelants, Simon Peterson, the carpenter, Levi Sprinkle, first engineer, Augustus Ducoing, second engineer, and James M. Brown, the mate on board the Tiger; for there is nothing in the evidence to show that they performed a single act out of the line of their ordinary duty. They neither said nor did anything which indicated a wish or disposition to co-operate with the captain and pilot in their laudable efforts to bring the derelict vessel out of danger. The remark of the proctor at the bar, that the occupation of an engineer is such, that it would have been impossible for him with safety to the tow-boat, to have abandoned his post, is all very true; but it might with the same propriety be made with reference to the pilot or the fireman, who had each their separate

and peculiar duties to perform, and we cannot say that because they could not do an act, that therefore they should be rewarded for its performance by another, when it is not shown that there was even a wish expressed, or a disposition exhibited, to render the service desired. In reply to the question, what is a salvor? Lord STOWELL, in the case of *The Neptune*, 1 Haggard, 286, replies that "it is a person who without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship." Now there is nothing in the evidence to show that any of these intervening libelants either proffered or gave any useful service to this derelict vessel, and I have no hesitation in saying that their claim for salvage is without foundation, and ought to be dismissed.

I am now to consider the claim of the owners of the *Tiger*, who also appear here as intervening libelants; and my attention is first called to the ingenious remarks of the counsel of the respondents, as to their right to be recognized as salvors at all. The definition of the term "salvor," just quoted from Lord STOWELL, has reference to one who claims to be considered as such, from an active participation in the service and peril for which he expects to be rewarded. But there are others, who had been repeatedly regarded by our ablest admiralty judges, as entitled to share in the *quantum* of salvage. On this point, I need only quote from the decision of Judge STORY, in the case of the *The Henry Ewbank and Cargo*, 1 Sumner, 424. "The owners, then, have a just claim to share in the salvage in all cases, where their property is put at risk, in effecting the salvage service." And again, on page 445 of the same decision, he continues: "But the law does not stop short with a mere allowance to the owner of an adequate indemnity for the risk so taken. It has a more enlarged and a higher aim. It looks to the common safety and interest of the whole commercial world, in cases of this nature; and it bestows upon the owner a liberal bounty and reward to stimulate him to a just zeal in the common cause, and not to clog his voyages with narrow instructions, which should interdict his master from any salvage service. If a bare

compensation for loss and risk were allowed, what motive could any owner have to suffer his voyage to be retarded, his just expectations of profit to be frustrated, his whole commercial arrangements to be suspended upon risks, which he could neither foresee nor guard against by any common prudence? The law has a wise regard to considerations of this nature; and it offers, not a premium of indemnity only, but an ample reward, measured by an enlightened liberality and forecast. While I agree with Lord STOWELL, 'that the master and crew are, in strict language, the only salvors,' I cannot agree to the justice of the remark, 'that the owners in general have no great claim; as to labor and danger, none;' and that they come in only upon the equitable consideration of the court, for damage or risk which their property might have incurred. This latter remark is not borne out by the subsequent practice of that eminent judge; for he has been liberal in awarding salvage to the owners. I can, with far more satisfaction, unite in the opinion of Mr. Chief Justice MARSHALL, in speaking on this subject in the great case of *The Blaireau*, 2 Cranch, 269, where he says: 'The proportion allowed to the owners of the firm' (the saving ship), 'and her cargo, is not equal to the risk incurred; nor does it furnish an inducement to the owners of vessels to permit their captains to save those found at sea, in any degree proportioned to the inducements offered to the captains and crews.' To this," Judge STORY continues, "it may be added, that it furnishes a strong inducement to officers and seamen, not to desert their own proper duty to their owner and his interest, for selfish purposes, by making them share only in subordination to, and in connection with those interests." In addition to these high authorities, the communication signed by the counsel of the respondents, proposing a settlement of the claims of the owners and the other libelants, seems to treat and recognize them as entitled to claim salvage.

I am clearly of the opinion, therefore, that these owners of the tow-boat are properly before the court, and have a right to receive a compensation and reward for the services rendered by their tow-boat. This compensation or reward is to be accorded, however, upon different principles, and for different reasons

than it would be bestowed upon the captain and pilot, were they now urging their claims before the court. There are many facts detailed in the evidence given upon the trial, which must exercise necessarily an important influence upon my mind in decreeing the *quantum* of salvage. It is clearly established, that a vessel and cargo entirely derelict, has been saved by the captain and pilot of a steamboat, which is employed by the owners in the business of towing vessels from the sea to this port. It is also established, that although the aid by which they were restored to safety, was afforded in weather which was for the most part favorable to the salvors, yet that it was in time to save them from the probable consequences of a violent gale, which the tow-boat and her charge encountered while steering their course to the Balize; and which in the opinion of Captain Kroll, would in all probability, have driven the former ashore, some time in the course of the following night. In this opinion he is sustained by that of his pilot, Mr. Clarke, who also states, that he considered the gale sufficiently violent to have dismasted the Charles; or if it had struck her with her sails set, as they were when she was discovered by the officers of the tow-boat, to have driven her so far under, stern foremost, that she would have filled. Both of the witnesses seem to be quite confident in the opinion that she would have been driven in a short time by the winds and waves on shore. In such an event, she would, in all probability have been a total loss. To weaken the opinion expressed by these two witnesses on this subject, that of Captain Hernman, was asked by the counsel of the respondents. And although this last witness thought that it was impossible for the ship to have been driven ashore in so short a time as stated by Captain Kroll and the pilot, yet he did not say that it was impossible for her to have shared this fate in a somewhat longer time. Upon this point, I can entertain but little doubt, when I recollect that the master of the Louis Quatorze, stated, that she was abandoned at the distance of forty miles from the Balize, about twenty-four hours before she was discovered, only eighteen miles from the South Point light-house.

I will conclude my view of this part of the case by another quotation from the able decision of Judge STORY in the case of

The Eubank, which I am induced to insert here by a remark which fell from the counsel of the respondent, to the effect that the ship was lying in the track of vessels passing to and from the Balize, and would, in all probability, have been discovered and brought in by some other vessel if she had not been relieved by the Tiger. "We are not," says Judge STORY, "to indulge mere possible conjectures on such subjects. The fact that she was saved is clear; the presumption that she might otherwise have been saved, during this long period, is mere matter of conjecture, *in nubibus*. It is not the habit of any court of justice to yield themselves up, in matters of right, to mere conjectures and possibilities; and, least of all, do courts of admiralty, in cases of salvage, yield themselves to imaginations of this sort. Salvors are not to be driven out of court upon the suggestion that if they had not touched a derelict ship and cargo, the latter might, in some possible way, have been saved from all calamity, and therefore, that the salvors have little or no merit."

Having satisfied my mind that the owners of the saving vessel are entitled to compensation and reward, I shall now proceed to determine the *quantum* of salvage to be allowed; and I may here remark that I cannot agree with the counsel of the owners in the estimate they have formed of the services rendered. It is true that this is a clear case of derelict, and I admit that in cases of this nature there are many precedents and high authorities for allowing a moiety to the salvors. Yet a review of these precedents and authorities will show that the rule is not inflexible; and the admiralty courts, both in England and in this country, have been governed in their decrees by the peculiar circumstances of each particular case. A candid consideration of the facts already detailed, has led me to regard the services rendered to the Charles as highly meritorious, but totally unattended by any peril to the salvors, and with little difficulty, save what they encountered in consequence of the gale they experienced in towing the ship to the Balize. After entering the Balize, no further impediment was offered by the winds; and the only obstacle that presented itself to their progress, was the current of the Mississippi river, which the tow-boat is required daily to encounter. The salvors were not even prevented from

bringing up other vessels from the Balize, and were consequently subjected to no loss, and but little delay in following their usual occupation. And although there has been a valuable service rendered to the owners of the derelict vessel, it is yet difficult to meet with an instance of salvage, wherein those through whose agency it may have been effected have been subjected to so little actual loss, or so little personal difficulty and peril. In awarding compensation for services of this nature, while I cheerfully acknowledge the merit to which they are entitled, I am, at the same time disposed, in the language of Judge HOPKINSON, in the case of *Hand v. The Elvira*, Gilpin's Rep. 75, "to teach the salvors that they may not stand ready to devour what the ocean may spare: that they must not be permitted to believe that they bring in a prize of war, and not a friend in distress." This view of the case would forcibly apply to the captain and pilot of the tow-boat, were they now before the court as claimants of salvage; and far more forcibly do they apply to the owners, who, in all the cases of this nature that I have examined, have been regarded as entitled only to a particular proportion of the whole *quantum* of salvage decreed. The ingenious proctors of the owners have contended for the rights of their clients upon a principle which, with due deference to the signal ability they displayed in the argument, I cannot recognize as the legitimate basis of the decree I am now called upon to render. They seem to think, that because the crew of the tow-boat *Tiger* have failed to make out their claim for salvage, and the captain and pilot have declined asserting a right to compensation for their services, they (the owners) should receive a full moiety of the whole property saved, or the whole *quantum* of salvage which ought to be, or usually is decreed in such cases, to be divided among all the salvors. To the correctness of this principle I cannot assent. From the evidence upon which this case must turn, I cannot, in the first place, reconcile it to my ideas of strict justice, that a moiety ought to be decreed, even if the crew had proven the allegations of their libel, and the captain and pilot had also claimed as salvors. In the second place, I cannot adjudge the owners entitled to receive the portion which might have been claimed

by the captain and pilot. This would be acting upon the principle of awarding to cupidity the portion which modesty had declined receiving.

From an attentive consideration of all the facts of the case, I am of the opinion that one-third of the value of the ship and cargo, would be not only a fair but a liberal *quantum* of salvage to be awarded to the crew, captain, pilot and owners, if they were all before the court, and had legally established their right to salvage. But, as the owners are alone to be rewarded, and as it is shown that they themselves have not been subjected to either difficulties or dangers, and that their property (the tow-boat) was not exposed to any danger in the service which she rendered to the *Charles*, I am of the opinion that the proportion of one-third of the whole *quantum* before mentioned, will be a fair and liberal compensation to be allowed them. In this opinion I am fully sustained by Judge STORY, in the case of *The Henry Eubank*, from which I have already made liberal quotations, and which I have adopted as my principal guide in deciding upon the merits of this case, both because his opinion must be regarded as of very high authority, and because the decision itself contains a full and able review of the various important cases, of a like nature, decided in this country, by our highest admiralty tribunals. "If I had been called," says he, "for the first time, to say what, under ordinary circumstances, should constitute the proportion of the *owner*, I might have hesitated; but I incline to think that it would have occurred to me that one-third would be a suitable proportion. But if I had found that proportion to have been adopted in other cases, and to have become in some sort a habit in our courts of admiralty, my own judgment would have reposed upon it with an undoubting confidence. Now, upon looking into the cases decided in the superior courts exercising admiralty jurisdiction, it appears to me that it will be found to have been, throughout, "at least to some extent, a habit of these courts to award to the owner one-third of the salvage. That amount has certainly been not unusual in our most commercial districts, and especially in New York and Pennsylvania. See *The Brig Harmony*, 1 Peters' Adm. Rep. 34, note; *Ib.* 43; *The Cora*, 2 Peters' Adm. R. 301,

871. My brother, Mr. Justice WASHINGTON, adopted it after grave examination, in the case of *The Cora*, 2 Wash. Cir. C. R. 80, 87; and I find that it has prevailed more than any other rule in contested cases brought before the courts of the districts in which he presided. But what is of most powerful influence in this case, it was adopted by the Supreme Court in the case of *The Blaireau*, 2 Cranch R. 240, 269, 271, after the fullest deliberation upon solemn argument. It seems to me that that case ought to furnish a guide for all subordinate courts under common circumstances. I do not say that the rule should be absolutely inflexible, and not yield to any extraordinary merits, or perils, or losses on the part of the owners. Cases may exist in which it may be quite fit to allow the owner one-half, as was done in several cases stated at the bar. But all such cases must stand upon very peculiar and pressing circumstances." By this decision I am prepared to abide, with the single remark that the peculiar and pressing circumstances therein mentioned, are not to be found in the facts of this case.

My next duty is to put an estimate on the ship and cargo; and I regret that the evidence does not furnish me with some safe guide in coming to a conclusion on this point. There were no appraisers appointed by the parties in interest, and I am therefore compelled to make as fair an estimate as I can from the *ex parte* appraisements of the ship, made at different times, at the request of the owners of the *Tiger* and the agent of the respondents. The first appraisers considered the vessel alone, worth the sum of \$7,500; one of them (Gregory Byrne) states, that he considered this sum to be her value when she first returned to port, and that she depreciated in value afterwards, about \$1,000. Mr. Spedden and Mr. Robinson considered her in the month of October, to be worth about \$4,500, and the cargo to be worth \$3,800, making both vessel and cargo worth the sum of \$7,800. From an attentive review of the whole evidence, I am inclined to think that the first estimate was too high, and the last much too low, as far as related to the ship. The estimate placed upon the cargo, seems so nearly correct, that I am unwilling to interfere with it, especially as it seems from the date of the appraisement, to have been made during the last

month. The value of the ship, should, I think, be estimated at \$6,000; this is allowing \$1,500 as the amount she depreciated in value after the first estimate, and the allowance, I think, is sufficiently liberal, notwithstanding the testimony of Mr. Whitney, that he made several efforts during the summer, to sell her for the sum of \$4,000, and failed. I have no doubt, whatever, that his statement is strictly true; but in a deserted city such as this was during the prevalence of the epidemic, and at a time too, when large cash prices could not be obtained for the best vessels, it is not surprising that the most strenuous efforts to dispose of her, should have proved unsuccessful. But this fact cannot be justly taken as a criterion, by which we are to find out her intrinsic value. She could not have so far depreciated in value, when we take into consideration the fact, that as soon as she was bonded, the agent of her owners considered her capable of performing a voyage to Europe, and that she was actually dispatched upon that voyage.

Before making the decree in accordance with the above estimate, I wish to observe, that I have maturely considered the facts set forth in the supplemental answer and claim, filed by the counsel of the respondents a few days before the final trial of the cause; and although I cannot but regard the conduct of one of the owners of the *Tiger* (Clark), as highly censurable, yet I cannot say that there is any fact connected with the negotiations for a compromise, which a court could legally consider a ground for refusing salvage to the party and mulcting him in the costs of suit. There has been no legal tender of a specific amount, by a deposit of the money in court, nor have the propositions for a compromise been so made as that they can now be made a matter of judicial cognizance. "In salvage cases," says Dunlap in his Admiralty Practice, "which are frequently of great importance, and where propositions of compromise are often ambiguously made, and often liable to misconception, the Admiralty Court in England, disregards all tenders, except those formally made by acts of court. It is not known that this doctrine has been adopted in the courts of the United States; but the general practice is, in salvage cases, to make tenders by formal acts of court, which are legal memoranda of the nature of pleas."

The Ship John Taylor and her Tackle, &c.

Adopting this rule, which seems to be a safe and sound one, as my guide in this case, I cannot concur in the reasons urged by the proctor of the respondents, in support of the pleas set up in his supplemental answer and claim. Besides, the detention of the vessel cannot be said legally, to have been caused by the owners of the Tiger, when the record of the case shows that she was in the custody of the marshal, at the suit of the crew, before the written proposition for a compromise relied upon by the proctor for respondents, was made.

It is therefore ordered, adjudged and decreed that the owners of the Tiger do recover from the respondents and claimants of the ship Charles and her cargo, the one-ninth of the sum of \$9,300, and the sum of \$30, paid by the captain of the Tiger, to the six hands taken from the ship Powhattan to pump out the ship Charles, and also the sum of six dollars, paid by the said owners for taking care of her in port. And it is further ordered, adjudged and decreed that the said respondents and claimants pay the costs of suit.

JOHN CARTWELL *et al.* v. THE SHIP JOHN TAYLOR and her
Tackle, Apparel and Furniture.

District Court of the United States. Eastern District of Louisiana.
In Admiralty.

HON. THEO. H. M'CALEB, JUDGE.

1. The crew of a wrecked vessel, who have by meritorious exertions saved the tackle, apparel and furniture of that vessel, have a claim for compensation in the nature of salvage upon the property so saved.
2. It is the general doctrine of the English maritime law, from which ours is derived, that the payment of wages is dependent upon the earning of freight. If no freight be earned, no wages are due, for freight is the mother of wages; but in cases of shipwreck where the seamen cannot earn wages and yet perform a meritorious service, they are entitled to a salvage compensation for their labor and services in preserving the wreck of the ship and cargo, or either.

342 DISTRICT COURT OF THE UNITED STATES.

The Ship John Taylor and her Tackle, &c.

3. Where salvage is allowed to seamen for services performed in preserving the wreck of their own vessel and her cargo, the amount of wages they were receiving at the time of the disaster, is a safe and proper criterion to be adopted by the court in fixing the *quantum* of salvage they are to receive.
4. Compensation in such a case allowed to seamen, must be paid out of the proceeds of the property saved.
5. In awarding a salvage compensation at the rate of *fifty per cent.*, in accordance with the stipulations of a written contract between the United States consul at Havana of the one part, acting for the master, owners and underwriters of the wrecked ship, and the master of the schooner Warrior of the other part, in pursuance of which the said schooner came to the relief of the wrecked vessel, the court will not give the whole compensation to the master and owners and leave the seamen to look to the other moiety for their reward. The contract is not a rule that binds the court to grant so large a per centage on the value of the property saved to the master and owner only, as ostensible parties to the agreement, when it is shown that the dangers and toils incident to the enterprise, have been shared by the seamen, who were doubtless induced to embark in the undertaking by the very fact that such a contract was entered into by the master.

Mr. Cohen, proctor for libellant.

Mr. Moise, for the master and owner of the Warrior.

Mr. Schmidt, for intervener Grant.

MCCALDER, J.—This is a libel *in rem* against the tackle, apparel, furniture, and a portion of the materials lately belonging to the ship John Taylor, which was wrecked near Cape Antonio, on the south coast of the Island of Cuba, on the 18th of October last, while pursuing her voyage from Liverpool to the port of New Orleans. The original libel was filed by four of the crew of said ship, claiming a lien on the said tackle, apparel, &c., for the satisfaction of their wages, and also for additional compensation in the nature of *salvage*, for having saved the said tackle, apparel, &c., from the wreck of the said ship. Intervening libels were afterwards filed by twenty-one more of the crew of the wrecked vessel, claiming wages and compensation also in the nature of salvage, as set forth in the original libel. Then followed the intervening libel of Edward Griffith, master of the schooner Warrior, intervening for himself and for James Chapman, owner of said schooner, and William Saunders, mate,

Joseph Lovell, John Noyes, John Robinson, Benjamin Mitchell and Charles H. Corbin, seamen on board said schooner, and Nicholas P. Trist, the American consul at the port of Havana. Lastly, the libel of intervention of T. A. Grant was filed, claiming compensation in the nature of salvage for services in traveling by land across the island from Cape Antonio to the city of Havana for the purpose of procuring aid for the wrecked vessel, her crew and passengers.

I shall first consider the claim of the crew of the John Taylor. It has been most satisfactorily proved that they worked with energy and fidelity: that their services in saving the tackle, apparel, &c., of the wrecked vessel, were of the most meritorious character. The strictest subordination prevailed among them, and they manifested the most perfect willingness to do their duty, and displayed the utmost promptitude in executing the orders of the master. Through their aid, in conjunction with that of the officers and crew of the schooner *Warrior*, almost all the tackle, materials, &c., of the John Taylor were saved.

The first question that arises is: Have they a right to claim wages for the services they had rendered, and if not, in what manner are they to be compensated? I have examined the authorities on this subject with the strictest care and attention, and although it must be admitted that the ablest admiralty tribunals have differed somewhat in opinion, I am inclined to think that the view taken by Mr. Justice STORY in the case of *The Two Catherines*, is not only sustained by the greatest weight of authority both in England and in this country, but presents the whole subject in a light which reason must at once adopt and the immutable principles of justice forever sanction. I shall quote his remarks at some length. "It is laid down as a general doctrine of the English maritime law, from which ours is derived, that the payment of wages is dependent upon the earning of freight. If no freight is earned in the voyage, no wages are due; for, in the expressive phraseology of the ancient law, freight is the mother of wages. Hence, if the ship be lost during the voyage, so that no freight is earned, the mariners lose their wages. And by parity of reason, if by inevitable accident the freight is partly lost, it seems that the seamen lose a

proportion of their wages. The ground of this doctrine is said to be, that 'if the seamen should have their wages, in such cases they would not use their endeavors nor hazard their lives to save the ship.'⁽¹⁾ And the argument now is that the reason of the rule shows that it does not apply to a case of shipwreck like the present, where the whole freight is lost; for if the seamen are not entitled to wages for salvage from the wreck, they can have no motive to remain by and use their exertions to save it. And it is earnestly contended that all the cases in which it has been held that no wages are due to the seamen, are cases, not of shipwreck, but where the ship perished at sea, so that there was a total loss of ship and freight.

"It appears to me that upon the established doctrines of our law, where the freight is lost by inevitable accident, the seamen cannot recover wages, as such, from the ship owner. And it is perfectly immaterial in such cases whether the ship be lost or be in good safety. Nor does the case of shipwreck, strictly speaking, form an exception to the generality of this rule. It more properly introduces another principle, that of allowing salvage to the crew when they cannot earn wages and yet perform a meritorious service." After commenting at length upon the different opinions entertained by different authors, he thus proceeds: "But whatever may be the true doctrine on this subject in respect to wages, I am clear that upon principle, the seamen are entitled to salvage for their labor and services in preserving the wreck of the ship and cargo or either. It is a claim founded in natural justice and sustained by the most obvious motives of public policy and interest."

The opinion of Mr. Justice STORY is but a re-assertion of the same doctrine maintained by Judge PETERS in the case of *The Cato*, 1 Peters' Ad. Decisions, 58, 59. "The claim of the sailor," said he, "is not under his contract for wages out of freight; but in a new character as a salvor, he regains a rightful claim to wages, restored by rescuing the articles (whether parts of the ship or cargo) from the perils and loss to which the wreck had exposed them."

(1) Siderfin, 179.

The Ship John Taylor and her Tackle, &c.

The reasoning of these eminent judges I am inclined to adopt as my own rule of decision. The right which these seamen have to claim a reward, cannot be doubted; and it is immaterial whether this reward be granted as wages, or as salvage strictly so called, since the loss of wages consequent upon a loss of freight, is supplied by a compensation in the light of salvage for their meritorious services in saving from the wreck the tackle and materials, upon which the law secures them a lien.

Following the high precedents to which I have referred, I think it fair and equitable to take the amount of the wages which these seamen were receiving as my guide in awarding the *quantum* of salvage, and shall therefore allow them a continuance of those wages on the homeward voyage, at the same rate per month, to the day when the tackle, furniture and materials were taken into custody by the marshal of this court.

And now, in regard to the party upon whom this charge is to fall, I should probably feel some doubt, were I not happily furnished with a precedent by which I can be satisfactorily guided, to be found in the decision of Judge STORY in the case of *The Two Catherine's*, 2 Mason, 341. "It is not," says he, "like the ordinary charge of seamen's wages, which are a charge upon the ship owner, and are to be borne by the freight; but it is in the saving of the materials of the ship for the benefit of those who are to receive it *cum onere*. The case of *Frothingham v. Prince*, 3 Mass. Rep. 563, is also directly in point." The charge, then, will be paid out of that portion of the proceeds of the property saved which may fall to the underwriters, to whom, as I have learned, the property has been abandoned. It is my next duty to consider the claim of the owner, master and crew of the schooner *Warrior*, which went from the port of Havana to the relief of the *John Taylor*. This she did under a special contract entered into by Capt. Griffith her master, and N. P. Trist, the American consul at Havana, "acting for and on behalf of the master, owner and underwriters of the ship *John Taylor*."

I have examined with attention the contract under which the salvage at the rate of fifty per cent. is claimed, as well as all the facts and circumstances under which the services were rendered; and I can see no good reason for changing the rule of decision

adopted in the case of *The Clarion*, decided in this court a few days since. As to the merit of the services rendered, there can be no doubt. The evidence shows that the *Warrior* remained near the wreck almost a month: that she was frequently in great danger, and was on one occasion compelled to slip her cables and put to sea, as her anchors dragged among the rocks and she ran the risk of being thrown ashore. During the time she remained near the wreck her crew were busily employed in transporting the salt from the *John Taylor* on board their own vessel, and in stripping the former of such parts of her as were sufficiently valuable to be saved. In a word, the *Warrior* and her crew did all that human agency could accomplish in effecting the object they had in view when they left the port of Havana. Yet, in awarding the very liberal salvage of fifty per cent. as stipulated in the contract, I know no principle either in law or equity which would justify the court in giving the whole amount to the master and owner, and compelling the crew to look to the other moiety for their share of the salvage. I cannot recognize the agreement as a rule that binds the court to grant so large a per centage on the value of the property saved to the ostensible parties to the agreement, when the dangers and toils incident to the enterprise have been shared in equally by others, who doubtless were induced cheerfully to embark in the undertaking in consequence of this very agreement. To the view of the master and owner of the *Warrior* it may be very proper thus to subject to a mere contingency the hopes of their gallant crew. But in the eye of the court, it becomes a matter of great importance to protect the rights of the latter as well as the former; and if a particular indulgence is to be extended to either side, the seamen should reap the benefit of that indulgence; and for the obvious reason, that they are not always possessed of the capacity to protect their own rights.

But the ingenious proctor for the master and owner, as well as of the crew of the *Warrior*, has contended that the latter do no seek to avail themselves of the written contract, but wish to assert their claim against the whole amount of property saved. This position is equally objectionable, since it directly interferes with the rights of another set of salvors, whose claims, though

asserted upon a different principle, imperatively demand the protection of the court. And it is quite apparent that when these claims have been satisfied, there will be but a pittance remaining for the underwriters.

With due respect for the zeal displayed in the argument of this case, the court would respectfully suggest, that however meritorious may be the services of salvors, there is such a thing as overstepping the bounds of reason and moderation in the demands which are usually made for compensation for those services. This was a case which peculiarly called for the exercise of disinterested heroism and self-devotion, a case in which the appeals in favor of humanity were loud and irresistible. Let us hope that in such a case the meritorious exertions and the deeds of gallantry, which in fact have not been magnified beyond the deserts of those who performed them, were prompted in some small degree by the influence of the golden precept, "Do unto others as you would have others do unto you;" and not solely by the instigations of avarice or rapacity. Let it not be said, that bold and hardy adventurers in the cause of human suffering, after accomplishing the meritorious object they had in view, now seek to swallow up all that was left by the mercy of the winds and the waves.

I proceed now to establish the mode of distribution, and leave the precise *quantum* of salvage allowed to be hereafter ascertained. The proceeds of the property saved from the wreck of the John Taylor amounts to \$4,800; of this sum fifty per cent. is awarded to the owners, master and crew of the schooner *Warrior*, after deducting the costs of court and all expenses, and the two and a half per cent. due the consul in Havana. In allowing this last amount, I have deviated from the decision given in the case of *The Clarion*. In that case no proof was given of the right of the consul to make the charge. In the present case it was clearly shown. Besides, in the case of *The Clarion*, the amount allowed to the owners, master, &c., was sufficiently large to justify the course therein pursued. From the whole proceeds must be also deducted the \$29 still due to Mr. Grant for traveling across the island to Havana. I award him no more, because it has been proved by the master of the John Taylor, that this

The Ship Cabot.

sum, in addition to the \$100 he has already received, is a fair compensation for his services; and because he was at one time willing to receive it as satisfaction in full. I see no good reason why he should have subsequently demanded a higher compensation, the opinion of the attorney whom he consulted, to the contrary notwithstanding. When these deductions shall have been made from the whole amount of the proceeds, fifty per cent. of the remainder is to be divided among the owner, master, mate, and five seamen in the following manner: To the owner I award one-third of the fifty per cent; and the other two-thirds I divide into sixteen shares of \$100 each. Of these shares I award the captain or master seven shares, the mate four shares, and each seaman one share. From the other moiety must be deducted the sum of \$161, the value of a small boat, a cable, and an anchor, which were lost by the master of the Warrior, and for which he shall be indemnified.

The clerk will be furnished with an abstract of this decree, and ordered to pay over the money in accordance with the mode of distribution above prescribed, after the payment of the costs of court.

MCDONALD et al. v. THE SHIP CABOT.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. MCALEB, JUDGE.

1. A suit by a proctor in the admiralty for his costs or fees, is a familiar proceeding in the admiralty tribunals both in this country and in England.
2. Where wages due from a master to the seamen, are seized under a process of garnishment from a local court in the hands of the latter, at the very time that a suit for a penalty and wages brought by those seamen against the master, is pending in the United States District Court sitting as a court of admiralty, it is the duty of the master not to pay over the money before the expiration of the legal delay for the return of the garnishment, without the knowledge of the proctors in the admiralty suit. A payment under such circumstances will render the

The Ship Cabot.

master responsible for the costs of the opposing proctor, if the latter has thus been prevented from receiving them from his own clients in the ordinary way.

3. Negotiations for the adjustment of a suit in admiralty should be conducted in the presence of the proctors of the parties, as they have a personal and legal weight and a direct responsibility to the court.

———, for libellant.

———, for respondent.

MCCALEB, J.—The libel in this case was filed on behalf of a portion of the crew of the ship Cabot, claiming from the captain of said ship the penalty which they allege he had incurred, in consequence of putting them on a short allowance of provisions on the voyage from Dieppe and Bordeaux to the port of New Orleans. The amount claimed is \$144.

Three of the libellants, Alexander Gent, George Coffin and James Frost, also claim the sum of \$198 as wages, which they allege to be due.

The claim for the penalty for being subjected to a short allowance of provisions, is based upon the provisions of the act of Congress of the 20th July, 1790, section 9, being an "Act for the government and regulation of seamen in the merchant service."

I have attentively examined the testimony taken before the commissioner and introduced in evidence on the trial of the cause, and can find no just grounds for sustaining the first allegation of the libel. The testimony of McDonald, who was examined before the court, shows that on the voyage from Bordeaux to this port the crew were put on a short allowance of meat: that they did not have for a whole day more than enough for one meal; but that they did not trouble themselves to see to the weighing of the meat, and supposes that if they had tried they could have got more: that for eight or ten days before they arrived at the port of New Orleans, they had no meat, because not being able to get *enough* they did not trouble themselves to get *any*.

This evidence is entirely disproved by the concurrent testimony of the first and second mate and the steward of the ship. They show that the ship had on board an abundance of provis-

350 DISTRICT COURT OF THE UNITED STATES.

The Ship Cabot.

ions, more than sufficient for the passengers and crew : that the crew were put on an allowance of meat, but not on *short* allowance, each man having been allowed a pound and a half per day, which is the usual allowance. I shall, therefore, dismiss without further comment this part of the case, and shall now proceed to the main question at issue. The wages demanded by the libelants, or so much thereof as were really due, have been paid by the master after the libel was filed, out of court, and out of the presence and without the knowledge of the proctor who brought the action. This suit is now prosecuted by that proctor for the recovery of his costs. It is a proceeding familiar to the admiralty tribunals of this country and in England.

In this case, it appears from the evidence, that the wages due from the master to the libelants, were seized in the hands of the latter under a garnishment from one of the associate city courts of this city. Immediately on the institution of the suit in that court against the libelants, they confessed judgment. The master, upon receiving the garnishment, acknowledged himself indebted to the seamen for wages. The service of the garnishment was made on the 7th instant. On the afternoon of the 8th instant the money was paid to the deputy marshal of the city court, in the presence and with the approbation of the defendants in the suit, who are also the libelants in the present action. On the 7th instant the libel in the case was filed, and on the morning of the 8th it was served on the master. It was therefore in his hands at the time he paid the money under the garnishment, and he cannot plead ignorance of the fact that the libel was filed ; and with a copy of it in his hands, he was not justified in taking for true the representations of the libelants, that they had not libeled the ship. He was not bound to answer the garnishment until two days after he received it ; that he was bound to pay the money, will hardly be doubted. The seizure from the city court had created a lien on the amount of wages in his hands which he was bound to satisfy. It was his duty, however, instead of paying the money at the solicitation of the libelants in such unnecessary haste and under circumstances most suspicious, to have communicated the intelligence of the seizure to their proctor to enable him to take such meas-

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The Ship Cabot.

ures against his clients as would save him against an evident attempt to defraud him out of a compensation for his professional services, and to render him liable for the costs of a proceeding which had been instituted at their request and for their benefit. The conduct of this master does not seem to have been characterized by that candor which was due to the court, to say nothing of the proctor of the libelants. Instead of bringing to the notice of the court the fact of the seizure and the payment of the wages under it, a rule is taken by his proctor on the 11th instant (three days after the payment of the money to the libelants, and after they had embarked for a northern port), for them (the libelants) to show cause, on the 13th instant, why they should not furnish security for costs, or have their libel dismissed. This proceeding can be regarded as little less than a mere mockery, when we remember that it was within the knowledge of the master that the means by which the libelants could alone answer the rule had been paid by himself, under an order of court to satisfy a debt or a pretended debt due by them.

I am clearly of the opinion that the settlement of this suit out of the presence and without the knowledge of the proctors, was entirely irregular. It was the opinion of Lord STOWELL, expressed in the case of *The Frederick*, 1 Hagg. R. 220, that negotiations for an adjustment of a suit should be conducted in the presence of the proctors for the parties, as they have a personal and legal weight, and a direct responsibility to the court. This principle has been sanctioned by the highest admiralty tribunal in this country, and its maintenance is regarded as indispensably necessary to prevent those deceptions which are commonly practiced upon ignorant seamen, and which they, in turn, are but too apt to practice upon their proctors and upon the officers of court, with the view of avoiding the payment of costs. It is the duty of the court, and it should be the mutual care of the opposing proctors, to preserve the dignity of the profession, by discountenancing everything which is calculated to subject its members to the chance of becoming the dupes of designing litigants. While I have no hesitation in giving them the aid of the principle of law now invoked, to protect them from injury in all cases where proper caution is observed in the institution of suits,

352 DISTRICT COURT OF THE UNITED STATES.

The Schooner Juanita and cargo. Prize case.

which, in their apprehension, are just and proper, I shall feel as little hesitation in making them suffer the consequences of permitting themselves to become the instruments of promoting frivolous litigation, or of gratifying a spirit of malignity and oppression.

The proctor in this case has proved that he rendered services to the libelants. His compensation for those services has been defeated by the settlement of the case out of court without his knowledge. He has, however, failed to prove the value of those services, and I am unwilling to assume the province of putting an estimate upon them. Instead of referring the case to a commissioner for the purpose of taking proof upon the subject, and thereby subjecting the parties to additional expense and trouble, I will venture to fix a compensation subject to the approval or disapproval of the respondent. Should he object to the amount upon the ground of its being too large, I will order specific proof to be made. I will fix the amount at \$25, exclusive of the tax fee allowed by law. This amount, together with the costs of court, I order to be paid by the respondent.

W. F. WAGNER, U. S. Marshal, acting for the United States
v. THE SCHOONER JUANITA and cargo.

*District Court of the United States. Eastern District of Louisiana.
Sitting as a Court of Prize.*

HON. THEO. H. McCALIB, JUDGE.

1. Enemy property found within our territory on the breaking out of war, cannot be confiscated without an act of Congress authorizing such confiscation.
2. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of *policy* than of *law*. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all questions of policy, it is one proper for the consideration of the legislative department of the government, not of the executive or judiciary.
3. There being nothing in the act of Congress recognizing the existence of war be-

The Schooner *Juanita* and cargo. Prize case.

tween the United States and Mexico, which authorizes the confiscation of the property of the enemy found within our territory upon the breaking out of the war, this court has no power to confiscate such property.

Mr. Wilde, proctor for plaintiff.

Mr. Benjamin, proctor for respondent.

McCALEB, J.—The libellant in this case alleges, that actual hostilities having been committed upon the United States by the republic of Mexico, and a state of war existing between the two countries, the schooner *Juanita*, being a Mexican vessel, owned in whole or in part by citizens of Mexico, together with her cargo, tackle and apparel, likewise the property of citizens of Mexico and enemies of the United States, are in the port of New Orleans, and within the jurisdiction of this court: that said schooner with her cargo, was proceeding to the port of Matamoras within the Mexican republic, when they were taken possession of by an officer and men from the United States schooner *Flirt*, and ordered to New Orleans; the captain and several or all of the crew of the *Juanita*, being brought on board of the *Flirt* to this port.

The libel further alleges, that the *Juanita* was commanded by one Francisco de Astegua, as master, and navigated by a crew of nine men, mariners, citizens of Mexico, and that she and her cargo being property of citizens of Mexico, are good prize of war: that she was at the time of her seizure proceeding with her cargo, consisting of provisions, ammunition and munitions of war, to the relief of Matamoras, then in a state of blockade by the forces of the United States: that since her arrival in the port of New Orleans, her cargo has been transhipped on board of other vessels in this port, but about to sail immediately for places unknown to the libellant: that the United States schooner *Flirt*, after remaining in the port of New Orleans several days, sailed on a cruise, and that no proceedings whatever were instituted on behalf of the original captors: that the *Juanita* has been libeled in this court on the instance side thereof in admiralty, upon a pretended claim of Francisco Tio for advances and repairs. The

libel then concluded with a prayer for process against the vessel, cargo and apparel, and for their condemnation as prize.

A claim and answer is filed by Francisco Tio, who denies the right of the marshal to act in behalf of the United States, and alleges that he (the claimant) is a citizen of the United States: that he has for a long time past, been in commercial correspondence with José Lopez a subject of the queen of Spain, and vice-consul of her majesty for the port of Matamoras; and that in the months of December and January last, he was the consignee in New Orleans, of the schooner *Juanita*; and at the request of said Lopez, who was the consignor, advanced various sums of money for the expenses, repairs and refitting of the schooner, as the whole is fully detailed in his libel filed in this court. He further alleges, that by various letters received by him from Lopez, bearing date at Matamoras on the 19th of February, and 2d, 3d and 5th of March last, the purchase of a cargo was requested by said Lopez to be made on his account, to be shipped by the respondent to Matamoras; and the respondent was requested to advance the price of the merchandise upon the promise of Lopez to reimburse the same on the arrival of the goods at the port of destination: that accordingly he purchased merchandise to the value of \$7,000, and caused it to be shipped on board the *Juanita*, and obtained insurance upon it in his own name and for whom it might concern, in the office of the general mutual insurance company in New York: that the schooner thus laden, was duly cleared at the custom-house in this city, and departed on her voyage for Matamoras. He further alleges that at the time of her departure and long afterwards, peace existed between the United States and Mexico, and the voyage was in all respects open, public and lawful: that on the 11th of April, the schooner arrived off Brazos St. Jago, and was detained several days in endeavoring to cross the bar, in the vicinity of Point Isabel, where certain forces of the United States, both naval and military, were stationed: that on or about the 25th of April, the commanding officer of these forces sent an officer and soldiers on board the schooner to examine her manifest, and instructed the soldiers to remain on board; and the schooner was thus detained until the 5th of May, when by permission of General Taylor,

The Schooner Juanita and cargo. Prize case.

the commander in chief, the soldiers were withdrawn and the schooner was permitted to return to New Orleans, where she arrived on or about the 13th of May; and after duly reporting at the custom-house, was permitted to discharge her cargo. He alleges that upon the return of the schooner and the breaking up of the voyage by the causes here detailed, he determined to abandon the adventure, and accordingly ordered the discharge of the schooner, and caused the cargo to be landed and stored partly in the custom-house and partly in public stores, and resumed possession of the goods as owner: that he also filed his libel against the schooner on the instance side of this court, to recover the amount of his charges and disbursements: that the marshal of this court well knew the premises, and was in the actual possession of the schooner, her tackle and apparel, in his official capacity, under the process issued at the instance of him (the respondent) when he caused the libel in this cause most unjustly to be filed.

The respondent most positively denies, that the cargo belonged to any citizen of Mexico; and that the schooner was captured by the forces of the United States. He denies, that the captain and crew were brought to New Orleans, on the Flirt, or that the cargo consisted of ammunition or munitions of war, or that said cargo was intended for the relief of Matamoras. He denies that that port was on the arrival of the schooner at the Brazos St. Jago, in a state of blockade, or that any blockade had been declared. He denies that any part of the cargo was shipped on other vessels to be sent away. He maintains that his claims against the Juanita for which his libel was filed, are just and legal, and avers that the restraint and detention of the authorities of the United States, ceased entirely on the 5th of May, and that the schooner returned to the port of New Orleans under the control of her own officers and crew, free of any further restraint. He also avers, that the voyage and adventure were in all respects peaceable and lawful: that it commenced during the continuance of peace, and the arrest, detention and return of the schooner, occurred before hostilities had been declared or commenced: that his proceedings after the return of the schooner, were open, public and notorious, and in every respect lawful and

just, while the proceedings of the marshal have been wholly unwarranted, unfounded and illegal. He therefore prays for a restitution of the cargo and for permission to prosecute, without further hindrance, his claim for repairs and advances, on the instance side of the court.

A replication to this answer and claim, was filed on the part of the libellant, alleging that the respondent by his own showing, admits, that the seizure of the schooner by the United States force, was abandoned, and therefore it can in no wise interfere with, or prevent the present subsequent seizure, or affect the rights of libellant under the same. It avers that the pretended claim of the respondent, is unfounded in law and fact, and absorbed and destroyed by the law of war: that a blockade was rigorously enforced at the time the *Juanita* arrived off the Brazos St. Jago. It further avers, that the answer is evasive and disingenuous, in not stating the national character of the vessel, and in not stating whether the cargo did at the time of shipment and at the time of capture, belong to the claimant.

As cases of this kind are new in this court, I have considered it due to the parties in this action, to set forth distinctly the grounds upon which each has rested his claims for a favorable decision. It will be apparent, however, from the facts developed upon the trial, that many points have been presented by the pleadings and discussed in argument, which are not material to a correct conclusion. The most important allegations in the libel are not sustained by those facts. There was indeed a seizure of the vessel at the mouth of the Rio Grande, by the forces of the United States there stationed, but as appears by the admission in both the answer and the replication, that seizure was abandoned. The *Juanita*, therefore, did not return to the port of New Orleans in charge of the *Flirt*, as alleged in the libel, but under the control of her own master and crew.

It is due to the claimant that I should state that, after an attentive examination of the evidence, I have not been able to satisfy my mind that there has been anything unfair or improper in his conduct. There is nothing in the papers of the vessel, against which this proceeding has been instituted, that implicates him in a transaction at all inconsistent with fair dealing, or the

rules which govern an open and honest commercial intercourse. His correspondence with his consignor, has disclosed nothing like a fraudulent design to carry on a contraband or other trade with an enemy. He seems simply to have acted in accordance with his instructions, in the purchase and shipment of the cargo, and at a time when it does not appear that war prevailed between this country and Mexico. It is not proven that at the time he cleared the vessel for Matamoras, that port was in a state of blockade, nor does it appear that any blockade was declared or enforced until after the arrival of the vessel off Brazos St. Jago. His answer is not as explicit as it should be on the subject of the national character of the vessel, but as it was made under oath, and contains so full, and what appears to me, so candid a statement of the official character of his consignor, and the relations which existed between that person and himself, that I do not feel myself at liberty to presume that his omission to give the national character of the vessel, was prompted by a willful design to evade, when perhaps he was ignorant of the true owners. But regarding the omission in the light of an evasion, I can only give the libellant the full benefit of it, by considering it as an admission of the fact that the vessel was Mexican property, a fact, in my opinion, sufficiently proven by the testimony elicited by the examination *in preparatorio*.

Proceeding upon the assumption that hostilities commenced between the American and Mexican forces after the arrival of the vessel off the Brazos, and that war existed at the time she was seized by order of the commanding general, I need not inquire how far this court would have been compelled to proceed to condemnation under that seizure, if those who made it had chosen to prosecute to an adjudication. That question cannot arise in the cause. We have seen that the seizure was merely temporary. The schooner was released, and permitted to return to this port. She was found here when the libel in this case was filed, and when the act of Congress recognizing the existence of the war was passed, and the proclamation of the president on the subject was received. Admitting, then, that both vessel and cargo belonged to Mexican citizens, and became enemy property on the breaking out of the war, the only question

358 DISTRICT COURT OF THE UNITED STATES.

The Schooner *Juanita* and cargo. Prize case.

which can arise is that which has already received the consideration of the Supreme Court of the United States, to wit: Can enemy property, found within our territory at the breaking out of war, be confiscated by a judgment of this court without an act of Congress authorizing a confiscation? So far as the cargo in this case is concerned, this cannot be considered an open question. There is no doubt that when the libel was filed the cargo had been landed; and in the case of *Brown v. The United States*, 8 Cranch, 110, the very questions at issue were: 1st. May enemy property, found on land at the commencement of hostilities, be seized and condemned, as a necessary consequence of the declaration of war? 2d. Is there any legislative act which authorizes such seizure and confiscation?

Both these questions were answered in the negative by the court, and although the reasoning of Chief Justice MARSHALL, who delivered the opinion, was directed to the questions here stated, the principles of law which he has recognized as rules of decision in cases of this nature, are believed to be sufficiently broad to cover the case of vessels found in our ports at the breaking out of war.

"Respecting the power of government," say the court "no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will.

"Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask, is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government as to support proceedings for its seizure and confiscation, or does it vest only

a right, the assertion of which depends on the will of the sovereign power?

"The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.

"Between debts contracted under the faith of laws, and property acquired in the course of trade on the faith of the same laws, reason draws no distinction. Although, in practice, vessels, with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace, in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect, may not be uniform, that circumstance does not essentially affect the question. The inquiry is whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will: and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts, being precisely the same with the right to confiscate other property found in the country; the operation of a declaration of war on debts and on other property found within the country, must be the same."

After quoting the authority of Vattel, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration of war," the chief justice thus proceeds: "It is true that this rule is, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest property of the enemy in the sovereign, his presence could not exempt it from this operation of war. Nor can a reason be perceived for

maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

Chitty, after stating the general right of seizure, says: "But in strict justice, that right can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities."

On this authority the Supreme Court remark: "The modern rule, then, would seem to be that tangible property, belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted, stipulating for the right to withdraw such property. This rule appears to be totally incompatible with the idea that war does, of itself, vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not, itself, confiscate the property of the enemy; and their rules go to the exercise of this right.

"The constitution of the United States was framed at a time when this rule, introduced by commerce, in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property which may enable the government to apply to the enemy the rule that he applies to us. If we look to the constitution itself, we find this general reasoning much strengthened by the words of that instrument. That the declaration of war has only the effect of placing two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. "Congress shall have power"—"to declare war, grant letters of

marque and reprisal, and make rules concerning captures on land and water." It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water is to be confined to captures which are ex-territorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question, as an independent substantive power, not included in that of declaring war. The acts of Congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found at the time within the territory. War gives an equal right over persons and property; and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war."

The court then examine the acts of Congress relating to the war with Great Britain, and especially that by which war was declared with that country, and after quoting that portion which authorizes the president to issue to private armed vessels letters of marque and reprisal, it thus continues: "That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted; but it is not admitted that in the declaration of war the nation has expressed its will to that effect. It cannot be necessary to employ argument in showing that when the attorney for the United States institutes proceedings at law for the confiscation of enemy property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel."

It was urged in the case of *Brown v. The United States*, as well as in the case now under consideration by the proctor for the libellant, that in executing the laws of war the executive

may seize and the courts condemn all property, which, according to the modern law of nations is subject to confiscation, although it may require an act of the legislature to justify the condemnation of that property, which according to modern usage, ought not to be confiscated. The language of the chief justice in answer to this argument is too strong and explicit to be misunderstood.

"This argument," says he, "must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed; this usage is a guide which the sovereign follows or abandons at his will. The rule like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. This rule is in its nature flexible; it is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary. Commercial nations in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country? is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary. It appears to the court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our own territory at the declaration of war."

I make no apology for the copious extracts I have taken from this able and lucid opinion. As an exposition of the law, it is obligatory upon the tribunal, and settles all the material points of controversy in the case now under consideration. The remarks of the chief justice in exposing the want of authority in

the district attorney to file a libel under the law of Congress, declaring war with Great Britain, apply with full force to the libellant in the present action. The question how far a seizure of enemy property found on land upon the declaration of war, can be made without an act of Congress, has been determined in terms too clear to leave any doubt on the mind of the court; and the rights of the owner to the cargo of the *Juanita*, are fully established, even admitting that owner to be an enemy. In respect to the vessel herself, now in the port of New Orleans, I consider the reasoning of the court equally strong against the claim of the libellant; she is to all intents and purposes property as much *infra-territorial*, within the limits of the United States, as the cargo placed in store a few hundred yards from the shore where she is moored; and she can with no more reason be said to be beyond the territorial limits of the United States, than the river upon whose waters she is now floating.

It is not pretended that there is anything in the act of Congress recognizing the existence of war with Mexico, that confers on this court the power to confiscate enemy property, found within our territory upon the declaration of war; and without such power, it is clear this seizure cannot be maintained. But it was contended by the learned counsel of the libellant in his concluding argument, that the decision of the Supreme Court of the United States, in the case of *Brown v. The United States*, was rendered at a period when the law of prize was new in that court and its principles imperfectly understood; and that the rules therein recognized, are inconsistent with the principles laid down in subsequent decisions, which emanated from the same high tribunal, as well as the well established principles of the practice of the high Court of Admiralty, in England. In the course of my anxious investigation into the merits of this cause, I have looked in vain for any rule or principle in the decisions of the Supreme Court, subsequent to that of *Brown v. The United States*, which can justly be regarded as inconsistent with, or in anywise militating against their judgment previously rendered; on the contrary, I find in a decision by them subsequently rendered, a distinct recognition and affirmation of the principles which had been their guide in the case here relied on. That a

different rule, so far as relates to vessels in port, prevailed in the high Court of Admiralty, in England, during the time the bench was occupied by Sir WILLIAM SCOTT, seems to be admitted by the court, in the case of *Brown*, and must be evident to all who have examined the opinion of that eminent judge, in the case of *The Rebecca*, 1 Rob. 227, and *id.* 280 note *a*. Whether this difference arose from a strong inclination on the part of Sir WILLIAM SCOTT, in favor of captors, or a disposition on the part of our supreme tribunal to adhere closely to the provisions of a written constitution, and their forbearance to exercise power not delegated by the legislative department of the government, it is unnecessary for me to decide, but that the difference exists, is beyond a doubt. "I respect Sir WILLIAM SCOTT," says Chief Justice MARSHALL, in delivering, not a dissenting, but a separate opinion, in the case of *The Venus*, 8 Cranch's Rep. 299, "as I do every truly great man, and I respect his decisions; nor should I depart from them on light grounds, but it is impossible to consider them attentively, without perceiving that his mind leans strongly in favor of captors. * * In a great maritime country, depending on its navy for its glory and its safety, the national bias is perhaps so entirely in this direction, that the judge, without being conscious of the fact, must feel its influence. However this may be, it is a fact of which I am fully convinced, and on this account it appears to me to be the more proper to investigate rigidly the principles on which his decisions have been made, and not to extend them, where such extension may produce injustice."

The proctor of the libellant has also urged upon my attention the dissenting opinion of Mr. Justice STORY, in the case of *Brown v. The United States*. Whatever may be my veneration for the memory of that illustrious jurist, whatever may be my respect for all that has emanated from his vigorous and comprehensive mind, and especially for the learning and ability he has displayed in the opinion he delivered in the very case referred to, it is unnecessary for me to say that I cannot permit his single dissenting opinion to operate as my guide in opposition to that of the majority of the court with MARSHALL at their head.

If the views of the court, conveyed in the lucid language of the venerable chief justice, require any confirmation, it will be found in the excellent Treatise of Wheaton on International Law, p. 866. "As the property of the enemy is in general liable to seizure and confiscation as prize of war, it would seem to follow as a consequence, that the property belonging to him and found within the territory of the belligerent state, at the commencement of hostilities, is liable to the same fate with his other property, wheresoever situated. But there is a great diversity of opinion upon this subject among institutional writers, and the tendency of modern usage between nations seems to be, to exempt such property from the operations of war."

After a learned and able review of the opinion of Grotius, Bynkershoek and Vattel, the writer concludes: "It appears, then, to be the modern rule of international usage, that property of the enemy found within the territory of the belligerent state, or debts due to his subjects by the government, or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it is thus enforced, it cannot be considered an *inflexible* though an *established* rule. 'The rule,' as it has been beautifully observed, 'like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign. It is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary.' Among these considerations is the conduct observed by the enemy; if he confiscates property found within his territory, or debts due to our subjects, on the breaking out of war, it would certainly be just, and it may under certain circumstances, be politic to retort upon his subjects by a similar proceeding. This principle of reciprocity operates in many cases of international law."

The opinion of the Supreme Court of the United States, in the case of *Brown v. The United States*, is afterwards referred to and quoted at length as establishing the rule which prevails in our own country. If a different rule had been subsequently

366 DISTRICT COURT OF THE UNITED STATES.

The Brig *Nayada*. Prize case.

prescribed by the court itself, it would hardly have escaped the vigilant researches of the distinguished author.

For the reasons here given, I am clearly of opinion that the vessel and cargo should both be restored; and I do hereby decree restitution accordingly, without the payment of costs.

DUNCAN N. INGRAHAM *et al.* v. THE BRIG *NAYADA*.

*District Court of the United States. Eastern District of Louisiana.
Sitting as a Court of Prize.*

HON. THEO. H. MCGALEB, JUDGE.

1. By the usage of nations, and according to the principles of natural reason, it is not lawful to carry anything to places blockaded and besieged.
2. The act of sailing with the intention of going to a blockaded port, with a knowledge of the blockade, is a violation of that blockade and works a condemnation of the ship.
3. Where vessels sail without a knowledge of the blockade, a notice is necessary. The right to treat a vessel as an enemy, is founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact.
4. The return of a vessel to a blockaded port, after she has been warned off, affords strong ground for presuming a criminal intent, and it is incumbent upon the master to rebut the presumption and justify his conduct.
5. Where a want of water is alleged as the reason for returning to a blockaded port, the evidence of the fact must be very clear and satisfactory, before it will be received. The testimony of the master and crew alone, unsustained by any corroborating circumstances, would be lightly regarded.
6. But although the rule of law is stringent in its nature, it does not exclude all reasons based upon a want of water or provisions as a ground of justification. On the contrary, a case of overruling necessity may arise from the danger of perishing from famine; and to contend against such a proposition, would be resisting the plainest dictates of humanity. It is, therefore, not the fact itself we are to reject, but the suspicious evidence by which that fact is generally attempted to be proven.
7. Where the court is satisfied that the re-appearance of a vessel off a blockaded port, was caused by a want of water, restitution of vessel and cargo will be decreed.
8. If under all the circumstances, the court is satisfied that the captors had reasonable ground for supposing that a vessel once warned off, returned to the blockaded

The Brig *Nayade*. Prize case.

port, with the intention of violating the blockade, all costs and necessary expenses will be allowed to the captors before the vessel is finally restored. These costs and expenses will be paid by the master of the vessel, as the agent of her owners. The master not being *de jure* the agent of the owners of the cargo, the latter are not to be held responsible for the consequences of his act.

T. J. Durant, United States district attorney, appeared for the captors.

C. Roselius, for the claimants.

MCCALEB, J.—The vessel against which the libel in this case was filed, was seized off the harbor of Vera Cruz, on the 30th of August last, by the commander of the United States brig of war Somers, belonging to the blockading squadron in the Gulf of Mexico, and sent to this port for condemnation. She was taken as a prize of war, upon the ground that she had violated the blockade now rigidly enforced by our squadron against the ports of Mexico.

From the evidence introduced on the part of the claimants, it appears that the *Nayade* is owned by Solomon and Berrend Roosen, merchants and ship owners of the Hanseatic city of Hamburg: that she sailed from Hamburg on the 5th of June last for Vera Cruz, and arrived off that port on the 27th of August. She was boarded by an officer from the brig Somers, who informed the master that the ports of Mexico were in a state of blockade, and that he must leave the coast. The boarding officer before leaving the vessel, inquired of the master, if he wanted anything, and received for answer that he wanted nothing. The captain, in accordance with the suggestions of the boarding officer, declared his intention to proceed to the port of Havana, and set sail accordingly. He had sailed on his course for forty-eight hours, when finding he had made only fifty miles, and the vessel being then becalmed, he became alarmed lest his supply of water, then reduced to about 250 gallons, would be insufficient, and determined to return to the squadron and obtain an additional quantity, and at the same time get permission to land his passengers, amounting to four men, who were on their way to the mines of Mexico. He returned accordingly, and on the

morning of the 30th of August, came in sight of the *Somers* and sailed directly for her. When he arrived within hailing distance, he asked permission to go aboard. Permission being granted, when he got on board the *Somers*, he was informed that he had been once warned off, and having returned, his vessel would be taken possession of as a prize of war, for having violated the blockade. A prize master was, on the following day, sent on board the *Nayade*, which was taken to Green Island, where her passengers obtained permission to land, and an additional supply of water was put on board by Lieut. Berryman, the prize master, under whose command the vessel proceeded to this port. Want of water is the excuse alleged by the master of the *Nayade* for returning to the squadron, after being warned away.

Under the order granted for taking additional proof, the testimony of Lieut. Berryman was taken on behalf of the claimants. He testified that he took charge of the *Nayade* as prize master, on the 31st of August. The prize crew, and the number of the crew of the *Nayade*, left on board, amounted in all to fifteen men. They were sixteen days coming from Green Island to the Balize. There were about one hundred gallons of drinkable water on board when they reached the Balize. The *Nayade* is a very indifferent sailer. They had little occasion to sail against the wind. She is a poor vessel to sail against the wind. The first five days after leaving Vera Cruz for New Orleans, she did not make more than two hundred and fifty miles, in consequence of light winds, and her very indifferent qualities for sailing under such circumstances. When the witness was put in possession of the *Nayade* as prize master, he made inquiry but no examination in regard to the quantity of water on board. After he took command, and until he reached New Orleans, the wind was generally favorable, being from the south, and sometimes from the westward. Such winds would have been fair for a voyage to Havana.

The testimony, both on behalf of the libelants and claimants, will be hereafter more particularly noticed, in examining the different questions of law growing out of the merits of the case.

It is urged on the part of the captors: First, that the alleged

want of water does not present such a case of absolute and 'overpowering necessity, as will justify the return of the *Nayade* to the blockaded port, after she received notice of the existence of the blockade. Secondly, that the master, after having been asked by the boarding officer of the *Somers*, if he stood in need of anything, and especially if he stood in need of water or provisions, and answering that he needed nothing, was inexcusable in returning three days afterwards to the squadron to take in a supply of water. His alleged want of water was a mere pretext for returning to the blockaded port. Thirdly, that even if the declaration that he was in want of water were true, the captain of the *Nayade* has not shown that he could not go to another port not blockaded.

On behalf of the claimants, it is contended that the want of water, under the circumstances established by the evidence, presents such a case of absolute and overpowering necessity, as will, in law, justify the conduct of the master. Secondly, that there is no evidence which will authorize the court in coming to the conclusion that any attempt was made to violate the blockade. Thirdly, that under no circumstances can the cargo be held liable to confiscation, since it is clearly established by the evidence that it is physically impossible that the blockade of the ports of Mexico could have been known at Hamburg, at the time the *Nayade* set out on her voyage; and there being no evidence to show that the master was the authorized agent of the owners of the cargo, the interest of the latter cannot be affected by the attempt of the master to enter the blockaded port, even if such attempt could be proved.

The principles of law applicable to trade with blockaded and besieged places, are well understood, and universally recognized by writers upon public law. It is well established "that by the usage of nations, and according to the principles of natural reason, it is not lawful to carry anything to places blockaded and besieged. It is sufficient that there be a siege or blockade to make it unlawful to carry anything, whether contraband or not, to a place thus circumstanced; for those who are within may be compelled to surrender, not merely by the application of force, but also by the want of provisions and other necessities. If,

therefore, it shall be lawful to carry to them what they are in need of, the belligerent might thereby be compelled to raise the siege or blockade, which would be doing him an injury, and, therefore, would be unjust. And because it cannot be known what articles the besieged may want, the law forbids in general terms carrying anything to them; otherwise disputes and altercations would arise, to which there would be no end." Bynkershoek Q. J. P., chap. 11, p. 82; Grotius de J. B. ac. P. lib. 3, cap. 1, § 5, no. 8; Wheaton's Law of Nations, 137.

With the clear and unequivocal recognition in favor of belligerents of the right of blockade as a right of war, let us inquire what acts on the part of neutrals are regarded as a violation of that right, and under what circumstances those acts may be excused. We shall of course refer only to such acts as have a direct relevancy to the merits of the case before the court, and have been brought to my notice by the authorities which have been here cited in argument.

It is well established that the act of sailing with the intention of going to a blockaded port, with a knowledge of the blockade, is a violation of that blockade, and works a condemnation of the ship. If a ship engaged in the prosecution of her voyage, is advised of the existence of the blockade, and proceeds on her voyage to the port blockaded, she renders herself liable to capture and confiscation. "Where vessels sail without a knowledge of the blockade," says Sir WILLIAM SCOTT in the case of *The Columbia*, 1 Rob. 156, "a notice is necessary; but if you can affect them with a knowledge of that fact, a warning becomes an idle ceremony, of no use, and therefore not to be required." Again; the same eminent admiralty judge, in the same decision, continues, "It is said also that the vessel had not arrived; that the offence had not actually been committed, but rested in intention only. On this point I am clearly of opinion, that the sailing *with an intention of evading the blockade* of the Texel, was a beginning to execute that intention, and is to be taken as an *overt act* constituting the offence. From that moment the blockade is fraudulently invaded." A relaxation of the rule here laid down is found in the subsequent case of *The Betsey*, 1 Rob. 334, decided by the same authority. It was made in favor of an

American ship which had been taken for a voyage from America to Amsterdam, and proceeded against for an intentional breach of the blockade of Amsterdam. "I hardly think," says Sir WILLIAM SCOTT, "that there is sufficient evidence to affect the parties with fraud. The ship sailed when the owners were certainly informed of the blockade; but *the distance of their country* is a material circumstance in their favor. I certainly cannot admit that *Americans* are to be exempted from the common effect of a notification of a blockade existing in *Europe*. But I think it is not unfair to say, that lying at such a distance, where they cannot have constant information of the state of the blockade, whether it is continued or relaxed, it is not unnatural that they should send their ships conjecturally upon the expectation of finding the blockade broken up after it had existed for a considerable time."

"Properly, every direction to a blockaded port," says Jacobsen, in his 'Laws of the Sea,' page 103, "with a knowledge of the blockade, works a condemnation of the ship. Single exceptions are made of vessels from *America*, who were permitted to inform themselves of the continuance of a notified blockade off the port of destination; however, it is very doubtful whether the exceptions from the rule will be longer indulged, as Sir WILLIAM SCOTT observed that it would be more pertinent to obtain information in sailing through the channel, or other passing opportunity."

By an edict of the States-General of Holland, as far back as 1630, relative to the blockade of the ports of Holland, it was ordered that the vessels and goods of neutrals which should be found going in or coming out of the said ports, although they should be found at a distance from them, should be confiscated, unless they should voluntarily, before coming in sight of or being chased by the Dutch ships of war, change their intention, while the thing was yet undone, and alter their course. Bynkershoek, in commenting upon this part of the decree, defends the reasonableness of the provision, which affects vessels *found so near to the blockaded ports* as to show *beyond a doubt* that they were endeavoring to run into them, upon the ground of legal presumption, with the exception of extreme and well proved necessity.

Wheaton's Elements of International Law, 547. And Sir WILLIAM SCOTT, in the case of *The Neutralitet*, 6 Rob. 35, a vessel found, not in port, *but only near to it*, held that if the belligerent party had a right to impose a blockade, it must be justified in the necessary means of enforcing that right. And if a vessel could, under pretence of going farther, approach, *cy pres*, close up to the blockaded port, so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. "It would, I think," said he, "be no unfair rule of evidence to hold as a presumption *de jure*, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence, and effectual to the exercise of the right of war."

Having thus presented the authorities drawn for the most part from the other side of the Atlantic, I will now turn to the opinion of the Supreme Court of the United States in the case of *Fitzsimmons v. The Newport Insurance Company*, 4 Cranch, 200, delivered by Chief Justice MARSHALL. In answer to the question, "is the intention to enter a blockaded port (evidenced by no fact whatever), a breach of the blockade?" the court says: "This question is to be decided by a reference to the law of nations and the treaty between the United States and Great Britain." Vattel, Vol. III, § 177, says: "All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy, whoever *attempts* to enter the place, or carry anything to the besieged without my leave."

The right to treat the vessel as an enemy is declared by Vattel to be founded on the *attempt* to enter, and certainly the *attempt* must be made by a person knowing the fact.

But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause:

"And whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the

The Brig *Nayada*. Prize case.

same is either besieged, blockaded or invested ; it is agreed that every vessel may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall *again attempt to enter* ; but she shall be permitted to go to any other port or place she may think proper."

"This treaty is conceived to be a correct exposition of the law of nations ; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it.

"Neither the law of nations nor the treaty admits of the condemnation of a vessel for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an *attempt* to enter that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed, that in such cases, the fact of sailing is coupled with the *intention*, and the sentence of condemnation is founded on an actual breach of blockade."

"It cannot be necessary to state that testimony which would amount to evidence of a second attempt—lingering about the place, as if watching for an opportunity to sail into it, or the single circumstance of not making for some other port, or possibly obstinate and determined declaration of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter a blockaded port. But whether these circumstances, or others, may or may not amount to evidence of the offence, the offence itself, in *attempting again to enter*, and 'unless after notice, she shall again attempt to enter,' the two nations expressly stipulate that she shall not be detained, nor her cargo, if not contraband, be confiscated. It would seem as if, aware of the excesses which might be justified, by converting intention into offence, the American negotiator had required the union of fact with the intention, to constitute a breach of blockade."

These authorities present clearly the principles which are to be my guide in coming to a satisfactory conclusion. I am now

to inquire how far they affect the case before the court upon the evidence adduced.

It is clear that the master of the *Nayade*, up to the moment he was warned away, did nothing in violation of law. He sailed from Hamburg in utter ignorance of the existence of the blockade. The proclamation of Commodore Conner, declaring the blockade, is dated the 14th of May last, and the *Nayade* commenced her voyage on the 5th of June following. It was therefore physically impossible that her master or owner could have known of the existence of the blockade at the time of her departure from Hamburg. From the testimony of her master and crew, which is all that we have on this point, they received information of it for the first time from the boarding officer of the *Somers*. The violation of the blockade, then (if there has been a violation at all), was committed by the master in returning to the *Somers* after she was warned off. The fact of returning would afford strong ground for presuming a criminal intent, and it is incumbent upon the master to rebut the presumption and justify his conduct. We have already seen that the alleged cause for returning was a *want of water*. This is a reason which has been commonly given by masters of vessels who have sought to justify themselves in entering a blockaded port, and the evidence of the fact must be very clear and satisfactory before it will be admitted. The testimony of the master and crew alone, unsustained by any corroborating circumstances, would be lightly received. "It is usual," says Sir WILLIAM SCOTT in the case of *The Hurtig Hane*, 2 Rob. 124, "to set up the want of water and provisions as an excuse; and if I was to admit pretences of this sort, a blockade would be nothing more than an idle ceremony. Such pretences are, in the first instance, extremely discredited on two grounds; that the fact is strongly against them, and that the explanation is always dubious, and liable to the imputation of coming from an interested quarter. I am not deaf to the fair pretences of human testimony, but at the same time I cannot shut my senses against the ordinary course of human conduct. I will not say that cases of necessity may not occur, that would afford a sufficient justification; and I add, that if the party can show that they were under any great neces-

sity, and that for four or five days before they could get into no other port but the Texel, I would certainly admit such an excuse so supported. But if they cannot do this, and unless it is proved, that in coming up the channel there was no other port, either English or French, but the interdicted port of Amsterdam into which they could put, I shall reject the apology."

Again; in the case of *The Fortuna*, 5 Rob. 27, he says: "The want of provisions is an excuse which will not, on light grounds, be received, because an excuse, to be admissible, must show an imperative and overruling compulsion to enter the particular port under blockade, which can scarcely be said in any instance of mere want of provisions. It may induce the master to seek a neighboring port, but it can hardly ever force a person to resort exclusively to the blockaded port."

These decisions show the caution with which such excuses should be received, and they evidently require that the fact should be presented to the court sustained by other evidence than the mere declarations of the master and crew. But although the rule laid down by Sir WILLIAM SCOTT is stringent in its nature, I do not understand that it totally excludes all reasons based upon a want of water or provisions, as grounds of justification. On the contrary, I distinctly understand the eminent judge to convey the idea, that a case of absolute and overruling necessity may arise from the danger of perishing from famine. To contend for a moment against such a proposition would be resisting the plainest dictates of humanity. It is therefore not the fact itself we are to reject, but the suspicious evidence by which that fact is generally attempted to be proved. In the present case we are not to be governed by the testimony of the master and crew alone in ascertaining how far the alleged want of water was founded upon reality. There are certain facts material to a correct conclusion, which are satisfactorily established by the testimony of the prize master and boarding officer of the *Somers*, and which in my opinion, rebut the presumption that the master of the *Nayade* in returning to the station occupied by the squadron, had any intention of entering the harbor of Vera Cruz. The testimony of Lieutenant Berryman proves the *Nayade* to be a bad sailer; that she was sixteen days in performing

the voyage from Green Island to the Balize, a distance of about eight hundred miles. When the witness took charge of her as prize master, on the 31st of August, he put on board 240 gallons of water, in addition to about the same quantity, supposed to be then in the casks; and yet there remained only about 100 gallons when the brig arrived at the Balize. The testimony of her master and crew shows that on the second day after they set sail for Havana, she had made only about fifty miles: that on the 28th she was becalmed: that it was extremely warm, and there was a strong southwardly current. The distance from Vera Cruz to Havana is about one thousand miles, and fears were entertained that the current would take the vessel too far south, and that she might be taken by another vessel of war. Fears were also entertained that the water would give out before the vessel could reach Havana, as the quantity on board was on the 29th of September about 250 gallons.

When I take into consideration the bad qualities of the vessel, I see nothing unreasonable in this statement, and nothing unreasonable or criminal in the determination of the captain to seek a supply of water from the squadron—the nearest accessible source from which it could be obtained. Is there anything in his subsequent conduct which will justify the conclusion that he returned for the purpose of attempting to enter the harbor of Vera Cruz? His own testimony, which is substantially corroborated by that of the mate and carpenter, shows that he steered back until the evening of the 29th, when he came in sight of land. He shortened sail that he might not get close into the shore. His object was not to go through the blockading squadron, but to approach the Somers to ask for water. He perceived the Somers at daybreak, on the morning of the 30th of August. Just after broad daylight, he perceived that it was the same vessel that had warned them off, which they did not know when they first saw her. He then steered directly for the Somers, and when he got near her he lowered his boat overboard and asked permission to go on board of her. Permission being granted, he repaired on board and asked the captain of the Somers to give him some water and take off his passengers, as he was afraid of having a long passage to Havana, and of not having water

enough. The captain of the *Somers* answered that he would put a prize master on board of the *Nayade* and make a prize of her. This testimony, which unsupported, the court would feel itself bound to receive with great caution, is in all material points corroborated by the testimony of Mr. Hynson, the boarding officer of the *Somers*. He says: "The *Nayade*, after having been warned off, was next seen on the morning of the 30th of August. She was then not far from the position she held on the 27th, being a little farther to the southward. When first discovered on the 30th, deponent could not determine what course she was pursuing; she seemed to be standing off and on. When they made her out, they saw she was heading to the south, towards the *Somers*, which was also towards the harbor of Vera Cruz." Upon cross-examination he states that "as the *Somers* in beating, bore off from the land, the *Nayade* changed her course so as to head continually towards the *Somers*; while her course into the harbor of Vera Cruz would have been in the direction she was making when first discovered. The *Nayade* had a boat out some time before she came up to the *Somers*. The captain of the *Nayade* hailed and inquired if he might come on board the *Somers*. Permission was given and the captain came on board, and stated that he wanted to land his passengers, that he had been detained on the coast by light winds, and was in want of water, as he feared that he had not enough to take him to Havana.

There is certainly nothing in the evidence which authorizes the belief that any fraudulent intention was entertained of entering the harbor of Vera Cruz. It would be difficult for the court to presume a fraudulent purpose on the part of the master of the *Nayade* when it is assured that instead of attempting to run in under cover of the night, he kept his vessel "standing off and on" until he discovered the *Somers*, and then "as the *Somers*, in beating, bore off from the land, he changed his course so as to head continually toward the *Somers*." The conviction thus forced upon my mind is that the alleged want of water was not a mere pretence but a reality, which presented a case (in the language of Sir WILLIAM SCOTT) "of overruling compulsion," not certainly to run into the harbor of Vera Cruz, but to return to

the squadron. Being convinced that his intentions were honest, I can see no reasons why I should now say that he should have steered for another port than the one blockaded in order to avoid even the semblance of a criminal intent, especially when it is shown that he had started for another port and was compelled to return. The general rule laid down by Sir WILLIAM SCOTT on this point, is one which I have no hesitation in declaring should be applied in all cases in which facts are not adduced to rebut the presumption of guilt. There are exceptions to all general rules, and no court can disregard the particular facts which create the exceptions, upon the plea of sustaining a general principle. Compare the evidence in this case with that which governed the court in the case of *The Hurtige Hane*, 2 Rob. 124, and the distinction will be manifest. The latter was a Danish ship taken in the act of entering the Texel, and therefore there was no doubt as to her real intention. In the case of the *Fortuna*, the excuse was want of water and strong westerly winds. The general principle contended for here was recognized, but the court admitted evidence to show that she was forced in by the winds, and afterward released her. And can it be doubted that if, in point of fact, she had been driven in by actual want of provisions, she would also have been released? In most of the cases of condemnation for a violation of blockade decided by Sir WILLIAM SCOTT, the offences were committed on the coast of Europe, where the seaport towns were numerous, and ample opportunities were afforded, to vessels suffering for want of water and provisions, to run in and procure supplies. The rule laid down by Sir WILLIAM SCOTT requiring them to go to some other port than the one blockaded, could seldom be attended with any severity. It will readily be perceived that its rigid enforcement in cases arising on the Gulf of Mexico, where the ports are comparatively few and far separated, might sometimes be accompanied with disastrous consequences. I would not be understood, for a moment, as saying anything in derogation of the rule. I believe it to be salutary in its nature, and absolutely necessary for the effectual maintenance of all blockades; and I have no hesitation in declaring that it will be rigidly adhered to in this court on all proper occasions. But in

a case where it is satisfactorily shown that no attempt was made to enter the blockaded port; where, from the evidence, it would be difficult to presume that any intention to do so was entertained; where the vessel was not found, in the language of Bynkershoek, "so near the blockaded port as to show, *beyond a doubt*, that she was endeavoring to run into it,"—for she came up to the Somers thirty miles from the harbor of Vera Cruz—I can see no reason for its enforcement. The reason for going to the harbor of Havana was such as would, doubtless, have influenced any man under similar circumstances. The captain was well acquainted with the harbor, which he could enter without a pilot; and he was, besides, advised to go there by the boarding officer of the Somers, Mr. Hynson, who informed him that another Hamburg vessel, the *Julius*, which had been warned off, had gone thither. The master of the *Nayade* did not pretend that, at the time he returned to the Somers, he was in immediate want of water. But when the progress of his vessel was resisted by the opposing current, and when, on account of calms, he made no progress at all, he naturally became alarmed lest his supply would be insufficient for the voyage to Havana. Still, the case of overruling necessity existed; for whether it was immediate or remote, if it was plain that it must inevitably prove hazardous to continue the voyage, he is more to be commended for providing against the danger which threatened, while it was in his power to do so, than to proceed, in the face of danger, against his convictions, and thus peril the lives of his crew, and, consequently, the safety of a large and valuable cargo.

The proctor of the captors has contended that the pretended want of water was improbable, as appears by the testimony of the master of the *Nayade* himself. The evidence of the crew of the *Nayade* shows that they left Hamburg with 1,440 gallons of water, and that when they returned to the Somers they had 240 gallons remaining. To this quantity Lieutenant Berryman, the prize master, added 240 more; making in all 480 gallons, with which the vessel set sail for New Orleans. On her arrival at the Balize, there were remaining on board 100 gallons; showing a consumption of 380 gallons in sixteen days, the time re-

The Brig *Nayade*. Prize case.

quired to perform the voyage from Green Island to the Balize. Upon this statement of facts, the proctor of the captors argued (and certainly with irresistible force, taking this statement as true), that on the voyage from Hamburg to Vera Cruz, lasting, as it did, eighty-seven days, the *Nayade* would have required 2,088 gallons instead of 1,440. Notwithstanding the declaration of the captain of the *Nayade* that no more water was used than was really required on the voyage from Green Island to the Balize, I am perfectly well satisfied that he was mistaken, either in his statement of the quantity consumed, or of the quantity which he had on board when the prize master ordered an additional quantity. I considered it my duty to take further evidence on this point, and am fully satisfied, from the concurrent testimony of several experienced commanders of vessels now in this port, that a gallon a day would be a liberal allowance for each man on board of a ship. The consumption of twenty-four gallons per day by sixteen men was therefore extravagant, and the only way it could have taken place was through carelessness. Either it was uselessly wasted, or there is a mistake on the part of the witnesses as to the actual quantity on board. That this mistake may have been innocently committed, I have no reason to doubt. None of the witnesses pretend that any measurement was made, and Lieutenant Berryman says that he made inquiry, but no examination, in regard to the quantity on board when he took charge of the vessel as prize master. But I am confirmed in the opinion that the witnesses were mistaken, by the fact, which I have fully ascertained by actual measurement, that they were also mistaken in their statement of the number of gallons they had on board when they set sail from Hamburg. The number of gallons which the casks contained was 1,648, instead of 1,440; and taking as true, or nearly true—for it is evident that there was no accurate information on the subject—that the *Nayade* had on board 240 gallons when she was boarded the second time from the *Somers*, we find that each person had in the voyage consumed about one gallon and a fifth, which, though a liberal, is not an unreasonable or extravagant allowance, when we take into consideration the sultry season of the year when the voyage was performed.

The Brig *Nayade*. Prize case.

There is another fact I have ascertained by actual measurement, which will serve to show the want of accurate information on the part of the witnesses, and the consequent danger there would be in being guided implicitly by statements which are made upon supposition alone. The mate gives the number of casks on board the *Nayade*, and states that the large casks will contain about 100 gallons each. The report of the city gauger made from actual measurement, shows the sizes to be as follows : one of 150, two of 142, three of 117, one of 138, two of 115, one of 108, one of 121, one of 110, one of sixty-two, and one of thirty-four. This ignorance on the part of officers intrusted with the care of persons and property on a long voyage, is by no means commendable; but I do not allude to it for the purpose of imputing to them a criminality of design in making their statements. They do not profess to be accurately informed, and their ignorance under the circumstances cannot be called dishonesty. The most essential fact to be ascertained after all is, was there a want of a sufficient quantity of water on the *Nayade* to take her to Havana? As I have before intimated, I am satisfied that on this point the apprehensions of her master and crew were well founded. That these apprehensions were shared in to a certain extent by Lieutenant Berryman himself, is evident from the fact that he ordered an additional supply; and this precaution on his part was justified by the fact that on the arrival of the vessel at the Balize there were remaining on board only 100 gallons. Although I am satisfied that more was used than was actually necessary, it is yet quite clear that without the additional quantity put on board by the prize master, there would not have been sufficient for the voyage; and if there was not sufficient for the voyage to this port, it is perfectly manifest that there could not have been sufficient for the voyage to Havana, at least 200 miles further.

After a calm and deliberate consideration of all the facts of this case, I am satisfied that the return of the *Nayade* was prompted by no fraudulent design on the part of her master to violate the blockade, but the circumstances under which he was warned away devolve upon the court a duty to the captors which must now be discharged. The evidence is perfectly clear

The Brig *Nayade*. Prize case.

that the master was distinctly asked by the boarding officer of the *Somers* if he stood in need of provisions or water, and he replied that he wanted nothing. His return and demand for water three days afterwards, naturally created surprise and distrust on the part of the captors, and justified the course they pursued. The master of the *Nayade* has explained his conduct by saying that the reason he did not accept the offer of water made him on the 27th by the boarding officer, was that that gentleman remained on board the *Nayade* only fifteen minutes, and told so many things about the blockade, that he (the master), this being his first voyage as captain, was so bewildered that he did not take time to reflect or examine, but was desirous of getting off as soon as possible. Besides, the wind was at that time favorable for a voyage to Havana. The boarding officer, Mr. Hynson, also testifies that the captain, when warned off, seemed undecided what to do and was very much confused. Now, without taking upon myself to decide how far such embarrassment and confusion are inconsistent with that self-possession and decision of character which should always signalize the conduct of a commander of a vessel, but giving to this master all the benefit of his explanation, and believing, as I do, that his confusion arose from having his long and tedious voyage suddenly broken up at the very moment when he believed it was to terminate, and by the consequent loss and disappointment to which not only he but the owners of the large and valuable cargo were about to be subjected, it is yet clear that his private feelings, however honest, could not be taken as the criterion by which the captors were to regulate their public conduct. It was not their duty to institute an examination into all the facts and circumstances connected with the re-appearance of the vessel near the station occupied by the blockading squadron. The case was *prima facie* one which justifies their conduct; and although I feel bound to order the vessel and cargo to be delivered up, I shall order the costs of this action and the expenses actually incurred by the captors in bringing the vessel to this port, to be first paid by the captain, as agent of the owners. Upon the principle repeatedly recognized by Sir WILLIAM SCOTT, *The Imena*, 3 Rob. 170, and *The Adonis*, 5 Rob. 228, I am satisfied that the

The Cargo of Schooner *El Telegrafo*. Prize case.

owners of the cargo cannot properly be held liable for these costs and expenses. The master is not *de jure* their agent, unless so specially constituted by them, and they are not to be held responsible for the consequences of his acts.

I therefore decree restitution upon the condition here prescribed.

THE UNITED STATES *v.* The Cargo of THE SCHOONER *EL TELEGRAFO*.

*District Court of the United States. Eastern District of Louisiana.
Sitting as a Court of Prize.*

HON. THEO. H. MCALEER, JUDGE.

1. A person residing in the enemy country long enough to acquire a domicile there, is subjected to all the disabilities of an enemy, so far as it relates to his property.
2. A vessel sailing under the flag of the enemy, is considered as enemy property, and is liable to confiscation *jure belli*.
3. Upon the breaking out of war between the United States and the republic of Mexico, the province or department of Yucatan, belonging to Mexico, having assumed a flag of her own, and having manifested a determination to remain neutral, a special order was issued by the president of the United States, exempting her citizens from the operation of the laws of war. Under such circumstances no citizen or resident of Yucatan, could with impunity violate her neutrality by assuming, for the purposes of trade, the flag of the enemy.
4. It is a principle of the law of prize, as recognized by the Supreme Court of the United States, 9 Cranch, 388, that the two maxims of "free ships, free goods," and "enemy ships, enemy goods," are not necessarily connected. The primitive law, independently of international compact, rests on the simple principle, that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property.
5. From the foregoing principle, it follows, that a distinction may be drawn between the vessel sailing under the flag of the enemy and her cargo belonging to a neutral; but if it appear that the neutral has by his residence in the enemy country, acquired a domicile there, his property will be considered as enemy property.
6. The court will refuse an application for further proof, where the claim and test affidavit of the claimant are utterly at variance with his answers to the standing interrogatories.

384 DISTRICT COURT OF THE UNITED STATES.

The Cargo of Schooner *El Telegrafo*. Prize case.

7. The greatest solemnity is attached to examinations *in preparatorio*. The standing interrogatories are of a searching character, and well calculated to elicit truth and detect fraud; and the reasons must be cogent indeed, that would induce the court to deviate from the established practice, and permit a claimant by further proof, to contradict his own declarations, made under the solemnity of an oath, touching a fact so important as domicile or national character.

Mr. Durant, United States district attorney.

Messrs. Clarke & Stewart, proctors for the captors.

Mr. Soule, for the claimant.

McCALEB, J.—The vessel containing the property which is now the subject of contest, was captured by the United States steamship *Mississippi*, under the command of Commodore Perry, on the 21st of October last, about thirty-five miles from the bar of the Tobasco river. She was taken as enemy property and as such condemned by a judgment of this court, as prize of war to the captors.

A claim has been entered for the cargo by one Antonio Gual, who declares himself the owner of everything found on board, except a few articles of little value which were the property of the master. I will briefly advert to the evidence upon which the condemnation of the vessel was pronounced, and then proceed to inquire how far I am permitted to draw a distinction in favor of the cargo.

The deposition of the master in answer to the standing interrogatories, shows that the schooner "sailed under Mexican colors and had none other on board. He was appointed to the command of the vessel by John Graham, at Campeachy, on the 2d of October last; Graham was owner of the vessel when she was seized; the deponent knows this because Graham told him so; the said owner is an Englishman, and is a brother-in-law of Mr. McGregor, the American consul at Campeachy; he resides with his family in Campeachy, but deponent does not know how long he has resided there; nor does he know how long said owner has been in possession of the vessel, nor from whom he purchased her. He thinks the said owner came from

England to Campeachy, and that he is an English subject." In answer to the thirty-second interrogatory, the deponent declares that "as to the property of the *Telegrafo*," she stands in the name of Alexandro Perez, who is a Mexican citizen, but really belongs to John Graham, who being an Englishman, cannot hold her in his own name.

The deposition of Antonio Gual, the claimant of the cargo, shows that a commercial house in Campeachy, composed of John Graham and Jose Calome, is the owner of the *Telegrafo*, though she stands in the name of some other person whose name deponent cannot recollect. He knows that the persons here named were the owners, by documents which he has seen. The said owners were born, the former in England, and the latter in Campeachy. They now reside in Campeachy. Deponent never knew of them in any other place; they have been in possession of the vessel a long time; they purchased her from one Ramirez; the only sale he knows of, is that from Ramirez to Graham & Calome. He does not know what was the consideration of the sale, nor whether the same was paid, nor any security given. He thinks that said bill of sale transferred the vessel to an individual whose name is unknown to the deponent, but that Graham & Calome are, and were the true owners. He believes that the vessel, if restored, will belong to Graham & Calome, and none others.

The certificate of John F. McGregor, styling himself United States consul at Campeachy, shows that "the Mexican schooner *Telegrafo* is owned by Don Alexandro Perez, a citizen of Campeachy." The papers of the schooner show her to be a vessel of the department of Yucatan, in the republic of Mexico.

I have not considered it necessary to determine whether the ownership of the vessel be in Graham & Calome, or in Perez, the Mexican citizen; for whether it be in the one or the other, the evidence shows enough to authorize a condemnation. If this question were important, I should undoubtedly feel myself bound by the register or bill of sale which fixes the ownership in Perez. But the residence of Graham & Calome, the latter being a citizen of Campeachy, places them in the situation of enemies. Whatever exemption from the laws of war might be

pleaded in favor of Yucatan vessels, it is clear that the conduct of the owners has not been such as to authorize the court to draw any distinction between them and other citizens of Mexico residing in any other part of the republic. It has been proved before this court, that Yucatan had a flag of her own. Had this vessel been found sailing under it at the time of her capture, there would be some ground for supposing that the owners were adhering to that state of neutrality, which the executive department of the government was led to believe would be observed by Yucatan, and which was, on the breaking out of the war, declared in a circular of the secretary of the treasury, to be the ground of extending to the ports of that country, privileges which, by the laws of war, were necessarily forbidden to the other ports of the republic of Mexico. But the concurrent testimony of the master and crew shows that she sailed under Mexican colors, and had no other colors on board; thus openly claiming the protection of the flag of the enemy, and boldly setting at defiance the American squadron now blockading the ports of Mexico. The conduct of this vessel can be regarded in no other light, than as an open and flagrant violation of the very condition upon which our government extended the privileges to which I have alluded, to the ports of Yucatan; and may be regarded as among the many instances of bad faith on the part of citizens of that particular department, which prompted the executive department of our government to revoke the order contained in the circular of the secretary of the treasury, and to place her in the same attitude occupied by other portions of Mexico. The facts of the case thus presented, are not such as to authorize me to regard the vessel in any other light than as enemy property, and therefore liable to condemnation.

I will now consider the claim which has been asserted to the cargo. It is a well settled principle of the law of prize, as recognized by the Supreme Court of the United States, in the case of *The Nereide*, 9 Cranch, 388, that the two maxims of free ships, free goods, and enemy ships, enemy goods, are not necessarily connected. "The primitive law," says Mr. Wheaton (*International Law*, 480), "independently of international compact, rests on the simple principle that war gives a right to capture the goods

of an enemy, but gives no right to capture the goods of a friend. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property." Let us then inquire how far the national character of the claimant in this case, as established by the evidence, will authorize the court to consider the cargo as neutral property. In answer to the standing interrogatories, the claimant himself declares, that "he was born in Spain. For the last seven years he has lived in Campeachy. He now lives in Campeachy, and has lived there twenty years. He belongs to the Yucatan government, originally belonged to Spain. He is not married. His brother and nephews live in Campeachy."

It is unnecessary to look beyond his own declaration, for evidence to establish his national character, or such a domicile in the enemy's country, as will authorize the court to invest him with a national character, different from that which attached to the place of his birth. The claimant, by his own showing, though born a Spaniard, has, by his long residence in the enemy's country, acquired a domicile, which, by the laws of war, and for all the purposes of this libel, subject him to all the disabilities of an enemy. By his own showing, he was, at the time of the shipment of the cargo, fully cognizant of the fraudulent design on the part of those whom he considered the real owners of the vessel, to conceal their ownership by a simulated sale to an individual whose name he did not recollect, but which is proven by the master to be Perez, a Mexican citizen. And whether the property of the vessel was really in Perez, or in Graham and Calome, he knew or was bound to know, that the birth place of one of the partners, and the acquired domicile of the other, invested both of them with the character of enemies, and consequently was fully aware when he sailed with his cargo on the *Telegrafo*, he was sailing in an enemy's vessel. We have, then, here presented a case of an enemy shipper, embarking with his property on board of an enemy vessel. "In general, and unless under special circumstances," says Mr. Wheaton (*International Law*, 390), "the character of ships depends on the material character of the owner as ascertained by his domicile; but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered

as bearing the national character of the country under whose flag she sails ; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of the country ; for ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries, may actually have in them. But where the cargo is laden on board in time of peace, and documented as foreign property in the same manner with the ship, with the view of avoiding alien duties, the sailing under the foreign flag and pass, is not held conclusive as to the cargo. A distinction is made between the ship, which is held bound by the character imposed upon it by the authority of the government, from which all the documents issue, and the goods, whose character has no such dependence upon the authority of the state. In time of war, a more strict principle may be necessary ; but where the transaction takes place in peace, and without any expectation of war, the cargo is not to be involved in the condemnation of the vessel, which, under these circumstances, is considered as incorporated into the navigation of that country whose flag and pass she bears."

It is unnecessary to apply the principle sustained by this high authority, with the same strictness therein required, to justify a condemnation of this cargo. It is clearly shown to be the property of the enemy shipped in time of war on board of an enemy vessel, sailing under the enemy flag. I shall not stop to inquire whether there may not hereafter be a reason for the equitable interposition of the executive to be drawn from the fact, that at the date of the capture, the order contained in the circular from the treasury department, exempting the ports of Yucatan from the laws of war, remained unrevoked. For under the circumstances of this case, I consider it immaterial whether the order of the executive thus issued through the secretary of the treasury, was revoked or not, at the date of the capture ; since, by the very terms of that order it is clear, that the strict neutrality on the part of Yucatan, which was the condition upon which it was granted, was disregarded alike by the owners of the vessel and the owner of the cargo. They have placed their property un-

der the protection of the flag of the enemy, and sailed for an enemy port. The vessel and cargo are, in my judgment, so included in this transaction, that it is difficult to perceive upon what ground any distinction can be drawn. The order of the president cannot be construed into a sanction of the double dealing of which the parties in this case have been guilty. That order is recognized as the rule by which this court will be governed; but as its effect was to relax the stringent principles of the laws of war, it should be strictly construed and confined to the object it was intended to accomplish. In adopting so liberal and humane a policy towards Yucatan, it certainly was never the design of the president, that citizens and residents of that country, should be allowed to abandon the neutral and appropriate flag of their particular department, and assume that of the enemy; nor could it have been his design to restrain the prize courts of this country, from inquiring how far the acts of those citizens and residents conformed to that state of neutrality and friendship towards the United States, in which the circular of the secretary of the treasury, expresses the hope they will remain. The questions which naturally and necessarily arise, are neutrality or no neutrality, hostility or no hostility; and the court cannot determine such questions without a free and unrestricted inquiry into the facts developed by the evidence. In the peculiar position occupied by Yucatan, it was the duty of her citizens, and those residing within her jurisdiction, to observe extraordinary caution in their commercial intercourse with other nations; and yet we see them, as in the case before us, openly assuming the garb of enemies, for the purpose of gaining access to the ports of the enemy. The conduct of the owners of this vessel and her cargo, presents to the view of the court a *discordia rerum* totally irreconcilable with a friendly or neutral attitude. They cannot be permitted at one and the same time, to plead before the prize tribunals of this country, an exemption from the general operation of the laws of war, under an order from the executive of our government, and before the tribunals of Mexico, an exemption from the operation of the same laws, by showing that they sailed under the Mexican flag. The very motive which prompted them to assume that flag, was

doubtless to avoid the difficulty and inconvenience which might result from the maintenance of a separate and independent national character.

But the proctors for this claimant have strenuously contended that he is not a resident of the enemy's country, and has never acquired a domicile there; but that, on the contrary, he is a subject of the queen of Spain, and a resident of Havana. In support of this position they adduce his own test affidavit, and his affidavit subsequently made, alleging that he was misunderstood by the prize commissioner when he gave his answers to the standing interrogatories. It is difficult to believe that such a total misapprehension could have existed on the part of both the prize commissioner and the sworn interpreter of the court, when it appears by the certificate of the former, "that the witness having declared that he could not speak the English language, and that the Spanish was his vernacular, the oath was administered, questions propounded, and answers received, and afterwards read over to him in the latter language, through Edward Lanne, a sworn interpreter." To the plain and simple questions, "Where were you born? where have you resided for the last seven years? where do you now live and how long have you lived there?" he has answered, "that he was born in Spain, for the last seven years has lived in Campeachy, and has lived there twenty years; he belongs to the Yucatan government—originally belonged to Spain." In his test affidavit and claim he alleges that he is a subject of the queen of Spain, a native of Catalonia, in Spain, and a resident of the city of Havana, in the Island of Cuba, one of the colonies of Spain. In his claim he further alleges, that for the last seven years he has been a resident of Havana, and that only occasionally, and in the fair and honest prosecution of his commercial dealings and transactions, visited the ports of Yucatan, of Mexico and of the United States; in neither of which ports he ever fixed his residence, but preserved his residence in Havana, as aforesaid, from which he started on his commercial undertakings.

Upon being informed by his proctors of the conflict between his answers to the standing interrogatories and the facts relating to his residence, as stated in his test affidavit and claim, he pre-

sented another affidavit, declaring, not that he misunderstood the questions propounded to him in the Spanish language by the interpreter, but that the interpreter must have misunderstood his answers. With every disposition to extend indulgence to a party whenever there is a fair ground for supposing that any misunderstanding or mistake may have arisen, I cannot reconcile such an indulgence with a faithful discharge of my duty in the present instance. It is extremely improbable that any such misunderstanding on the part of the claimant existed. There is no similarity in the sound of the names of Campeachy and Havana which will justify the belief that the interpreter could have mistaken the latter for the former. This fact, alone, would be sufficient to induce the court to reject the subsequent affidavits, without looking to other parts of his answers to the standing interrogatories, which state facts so totally at variance with those which it is now alleged were intended to be stated. And yet the learned proctors have, notwithstanding these glaring inconsistencies in the oaths of their client, urged upon the court the propriety of granting an order for further proof, to enable him to establish a residence in Havana. Whatever may be the strength of the conviction of the honesty of this claimant, which has animated the efforts of his proctors (whose sincerity I cannot for a moment question), I do not feel myself at liberty to take the same benevolent and charitable views of the motives by which he is actuated. In the language of Mr. Justice JOHNSON, in the case of *The Rapid*, 8 Cranch, 164: "It is the unenvied province of the court to be directed by the head and not the heart. In deciding upon principles that must define the rights and duties of the citizen, and direct the future decisions of justice, no latitude is left for the exercise of feeling." Temptations to fraud in cases of this nature are many and strong, but it is the duty of a court of prize to exact the utmost fairness on the part of both captors and claimants, and to frown upon every attempt at deception.

The fact that the claim is in opposition to the examination *in preparatorio*, would alone be a sufficient ground for the rejection of the claim. "The claim, too, of Mr. Tappan," says Mr. Justice STORY, in the case of *The Diana*, 2 Gallison, 96, "was in total

opposition to all the papers and preparatory examination. Now, I take the general rule to be, that no claim shall be admitted in opposition to the depositions and the ship's papers. It is not an inflexible rule, for it admits of exceptions; but, on examination, it will be found that those exceptions stand upon very particular grounds, in cases occurring in time of peace, or at the very commencement of war, and granted as a special indulgence. But in times of known war, to admit claims in opposition to all the preparatory evidence and papers, to enable parties to assume the enemy's garb for one purpose and throw it off for another, would be holding out an invitation to frauds, and subject the court to endless impositions. The rule can never be relaxed to such an extent without prostrating the whole law of prize."

"On the whole, I am entirely satisfied that the claim of Mr. Tappan, standing, as it does, in direct opposition to all the papers and preparatory examinations, ought, even if he had been a neutral, to have been rejected *in limine*."

The greatest solemnity is generally attached to the examination *in preparatorio*. The standing interrogatories are searching in their character, and well calculated to elicit truth and detect fraud, and the reasons must be far more cogent than those here advanced, to induce me, in the present instance, to deviate from the beaten track and allow the claimant, by further proof, to contradict his own declarations made under the solemnity of an oath, touching a fact so important as domicile or national character.

I shall, therefore, refuse the application for further proof, reject the claim of Antonio Gual, and condemn the cargo of the Telegrafo as prize of war to the captors.

The register is hereby ordered to enter a formal decree of condemnation.

COMMODORE DAVID CONNER *et al.* v. THE BARK COOSA, Seized
as prize of war.

*District Court of the United States. Eastern District of Louisiana.
Sitting as a Court of Prize.*

HON. THEO. H. McCALEB, JUDGE.

1. If, upon the return of the monition, no person appears to assert a claim to the vessel and cargo, the proctor of the captors may move for a decree upon the evidence as it appears on the record.
2. A violation of a blockade, rigorously enforced, is a good ground for the seizure and condemnation of both vessel and cargo.
3. To constitute a violation of blockade, three things must be proved. 1st. The existence of the blockade. 2d. The knowledge of the party supposed to have offended; and 3d. Some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade.
4. One of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the citizens of the states at war, with the license of their respective governments.
5. The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it; and condemnation to the captors is equally the fate of the enemy's property and of that found engaged in an anti-neutral trade.
6. If the claimant be a citizen or an ally, at the same time that he makes out his interest, he confesses the commission of an offence, which, under a well known rule of the civil law, deprives him of a right to prosecute his claim. *Ex turpi causa, non oritur actio.*

C. A. Stewart and Thomas A. Clarke, proctors for the captors.

T. J. Durant, District Attorney, for the United States.

McCALEB, J.—The monition in this case has been returned, and no person having appeared to claim either the vessel or cargo, the proctor for the captors has moved for a decree of condemnation upon the facts as they appear upon the record. In granting that motion it is proper that those facts should be briefly detailed.

On the 3d of October last, the vessel seized in this case cleared

for the port of Havana and left this port under the command of Captain Hinckling. Instead of proceeding to the port of destination she steered for the coast of Mexico. According to the evidence of the mate given in answer to the standing interrogatories, "she sailed for no port or place before she was taken, except that she anchored five miles off the bar of Alvarado, where she lost her anchor. Her last voyage began at New Orleans and deponent expected it to end at Havana, but cannot say where it *would* have ended. He thinks the vessel is insured in New Orleans for the voyage on which she was taken, that is, from New Orleans to Havana. He thinks so, from the fact that the captain and himself had some difficulty about the manner in which the *log-book* was kept, and it seemed to be the object of the captain to have it kept in a way to save the insurance. He knows not to what place the Coosa was destined by her papers; he thought when he joined her, that she was going to Havana. To the best of his recollection (without seeing the log-book) the winds were favorable to a voyage to Havana without making a tack. The course of the Coosa was not at all times directed to Havana. If she was destined by her papers to that port, she did, before taken, steer wide of the port to which she was destined; but at the time she was taken, she was steering a course towards Havana from where she was then. She was then, as far as he can guess, five or six hundred miles from Havana. He knows not for what reason her course was altered from the course to Havana. He was told by the captain that they were destined for Havana, and it was never hinted to him that they were to go elsewhere until about twenty-four or thirty hours out from the Balize, he remarked to Captain Hinckling that they seemed to be steering "pretty well south for Havana;" to which the captain replied, "I don't know, *perhaps we may hit Mexico.*"

From the evidence of this witness, it appears that the vessel sailed under American colors, but that she had on board *English* colors. This fact is also established by the testimony of Purdy, who further states that she hoisted *English* colors off Alvarado bar, and also a *flag of truce*. The captain when interrogated on this point, declared that there were no colors except American colors on board; but that there were one or two signals. This

The Bark Coosa. Prize case.

captain, whose fraudulent conduct is conclusively established by the evidence, declares that the vessel "sailed to no port after leaving New Orleans on the voyage on which she was taken;" that "at the time of being pursued and taken, she was steering off shore to get an offing. She was steering for no particular port or place at the time, *but was bound for Havana.*" He declares that Mr. Fairweather of this city, is the owner of the vessel, as appears by the registry, and that Wylie & Egana were the shippers of the cargo. He says that the only papers delivered from the vessel after she left New Orleans, was a package of newspapers which was delivered to some fishermen off the Alvarado river about the 14th of October last; while the witness Brown declares that Captain Hinckling delivered several letters, four or five in number, to a person who came from shore to the Coosa while she was at anchor off Alvarado bar. The witness Purdy says that some of the men sold some tobacco off Alvarado. There are two letters in evidence signed by one Louis Diaz and dated at Vera Cruz on the 21st and 26th of October last. The one bearing date the 21st of October is addressed to Captain Hinckling, and is as follows: "By letters from New Orleans which have been addressed to me by Messrs. Wylie & Egana, merchants of said city, I have learned that you had sailed in the bark Coosa destined for Havana; and having been informed that the vessels of the United States squadron had met you on this coast and compelled you to drop anchor at Anton Lizardo, I have arranged to send you this letter by a fishing boat, in order that you should, in answer, state the cause of your detention, and be left to proceed with your vessel to the place of destination designated by the interested parties. If permitted by Commodore Conner to write, I will thank you, without losing a moment, to inform me of all that has occurred in relation to the detention of your vessel, in order to communicate the facts to Messrs. Wylie & Egana."

The letter under date of the 26th of October, is addressed to Commodore Conner. In it the writer says: "I am the consignee of the bark Coosa, which was boarded on the 17th of this month five miles from Alvarado bar, and taken to your station, where she is detained. It is my duty, on behalf of the interested par-

ties, to declare to you that said vessel carried nothing but cotton from New Orleans, which cotton was to be introduced into this country in virtue of a permit granted by the government in the month of January last, without payment of duties. It has been said that the bark carried warlike weapons. This is a chimera which can easily be destroyed by merely observing that the cargo occupies the entire hold and deck, leaving no room for another bale; and consequently I think that any slight suspicions of such a nature will at once be disregarded. The existence of the blockade cannot, I think, be with a view to prohibit the commerce of the United States with this country, but on the contrary, it should favor it, inasmuch as it can be carried on with the products of said nation (the United States) and in *her* vessels. Under this impression the parties interested have acted in relation to the Coosa. These parties trade almost exclusively in American produce and manufactures, and have now several vessels in the Mexican gulf and the Pacific, with which they carry on speculations which benefit the United States; which circumstance induces them to claim protection in their undertakings. If these reasons, and others which I cannot confide to paper, are entitled to your consideration, I beg you will order that the bark Coosa be immediately released, so that she may proceed to the destination which suits the parties interested; and also that Captain Hinckling be permitted to hold communication with me to receive my instructions."

A letter from Commodore Perry to Commodore Conner, referred to in the deposition of Mr. Rodgers, the prize master, shows clearly that the Coosa was discovered on the morning of the 17th of October off the bar of Alvarado, "evidently endeavoring to pass into the river." From this letter it also appears that Captain Hinckling acknowledged that he had communicated with the enemy by receiving a pilot on board. The master declares that the reason he altered the course of the vessel was, that after getting out, or rather while going out of the South West Pass, he heard from a steamboat of the victory of Gen. Taylor at Monterey, and as the cargo was consigned "to order," he thought it best to go to the Mexican coast, as in consequence of the victory he was in hopes the blockade would be raised or

would cease, and that he would be permitted to land the cargo. For these reasons he took it upon himself to sail for the coast of Mexico. This story, if *true*, could not save the vessel from condemnation; but when I consider it in connection with the testimony of other witnesses examined, I am compelled to regard it as extremely improbable. The information received from the steamboat, which had the effect of inducing the master to assume the responsibility of changing the course of the vessel from Havana to the coast of Mexico, was, it seems, never communicated even to the first mate, who declares that it was never hinted that the destination of the vessel was to any other port than Havana, until they were out from the Balize from twenty-four to thirty hours, when, in reply to a remark made by himself that they seemed to be steering "pretty well south for Havana," the master said, "I don't know, *perhaps we may hit Mexico.*"

After an attentive consideration of all the evidence, I am satisfied that the vessel was not cleared at this port with any serious design of sending her to Havana; but on the contrary, that she sailed with the intention of proceeding to some port in Mexico. The letters of Diaz, whose effrontery is only equaled by his ignorance of the subject upon which he assumes the privilege of enlightening the mind of the commander of the American squadron, show clearly that the master in going to a Mexican port, was acting in accordance with the instructions, and executing the wishes and intentions of the shippers of the cargo. The nominal clearance of the vessel for the port of Havana was a scheme to elude the vigilance of the officers of the customs; and I regret to say that there is no feature in the transaction which entitles the parties concerned to the favorable consideration of the court. The vessel and cargo are equally implicated in the fraud, and must share the same fate.

There are two grounds upon which condemnation must be decreed. First, there had been a violation of the blockade now rigorously enforced by the American squadron against the ports of Mexico. To constitute a violation of blockade three things must be proven: 1st, the existence of the blockade; 2d, the knowledge of the party supposed to have offended; and 3d, some act of violation, either by going in or coming out with a

cargo laden after the commencement of blockade. *The Betsey*, 1 Rob. Adm. Rep. 92. The existence of the blockade of the ports of Vera Cruz and Alvarado is a matter of public notoriety, and the declarations of the master show that he was aware of it. The letter of Com. Perry shows that the vessel was taken *in delicto*. It was, moreover, clearly the intention of the parties concerned, to send the vessel to a port of Mexico; and the act of sailing to a blockaded port with a knowledge of the blockade, is a violation of that blockade, and works a condemnation of the vessel. These well settled principles of the laws of war I had occasion to consider in the case of *The Nayade*.

The second ground upon which condemnation must be decreed is, that there has been a trading with the enemy.

One of the immediate consequences of the commencement of hostilities, is the interdiction of all commercial intercourse between the subjects of the states at war, without the license of their respective governments. In Sir WILLIAM SCOTT'S judgment in the case of *The Hoop*, this is stated to be a principle of universal law, and not peculiar to the maritime jurisprudence of England. It is laid down by Bynkershoek as a universal principle of law. "There can be no doubt," says that writer, "that from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such intercourse as is often the case, commerce is forbidden by the mere operation of the law of war." *Quæst. Jur. Pub. Lib. I, cap. 3.* In the case of *The Hoop*, Sir WILLIAM SCOTT declared that "no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on commercial intercourse with the enemy, and under color of that, had the means of carrying on any other species of intercourse he might think fit?" Again; in the same case he says: "Another principle of law of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication, as fundamentally inconsistent with the relation existing between the two belligerent countries; and that is, the total inability to

sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. A state in which contracts cannot be enforced cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction—they have no legal existence; and the whole of such commerce is attempted without its protection, and against its authority."

The same principles were applied by the American courts, and especially by the Supreme Court of the United States, to the intercourse of our citizens with the enemy on the breaking out of the late war with Great Britain. In the case of *The Rapid*, 8 Cranch, 155, the Supreme Court determined, that whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times might have established, there had been none on this subject. The universal sense of nations had acknowledged the demoralizing effects which would result from the admission of individual intercourse between the states at war. "The whole nation," says Mr. Justice JOHNSON, who delivered the opinion of the court, "are embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country. This being the duty of the citizen, what is the consequence of a breach of that duty? The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it. Condemnation to the captors is equally the fate of the enemy's property, and of that found engaged in an anti-neutral trade. If the claimant be a citizen or an ally, at the same time that he makes out his interest, he confesses the commission of an offence, which under a well known rule of the civil law, deprives him of his right to prosecute his claim."

400 DISTRICT COURT OF THE UNITED STATES.

Schooner *Amado* and cargo. Prize case.

In this case it has been satisfactorily shown that the vessel not only left this port with the intention of landing her cargo at some port in Mexico, but that there was also an actual communication with the enemy, by the reception of a pilot on board and the delivery of letters and papers to a person who boarded the vessel from the shore while she lay at anchor off the bar of Alvarado.

For the reasons here given I shall condemn both vessel and cargo as prize of war to the captors.

LIEUT. HENRY J. ROGERS, and the UNITED STATES, Libelants
v. THE MEXICAN SCHOONER *AMADO* and her cargo.

*District Court of the United States. Eastern District of Louisiana.
Sitting as a Court of Prize.*

HON. THEO. H. McCALB, JUDGE.

1. Where a Frenchman by birth, had resided thirteen years in the republic of Mexico it was held, that he had acquired a domicile in the enemy's country which subjected him, so far as it related to his property, to all the disabilities of an enemy; therefore, a vessel with her cargo, both owned by him, found sailing under the flag of the enemy, was considered liable to seizure and condemnation as prize of war.
2. To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority. If delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who in legal language, are termed mandatories, or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental.
3. No consul in any country, particularly in an enemy's country, nor the commander of an American frigate, has any authority, by virtue of their official stations, to grant any license or permit which could have the legal effect of exempting the vessel of an enemy from capture and confiscation.
4. If there be anything in a license or permit granted by a consul, or a commander of an American frigate, to entitle a claimant to the equitable consideration of the government, it is to the executive or legislative department he must apply. A court of prize is governed by the laws of war, and can look only at the legal effect of such documents when introduced in evidence.

Schooner Amado and cargo. Prize case.

5. Time is the grand ingredient in constituting domicile; and in most cases it is unavoidably conclusive. The *animus manendi* is the point to be settled, and the presumption arising from actual residence in any place, is that the party is there *animus manendi*; and it lies upon him to remove the presumption, if it should be requisite for his safety.

T. J. Durant, for the United States.

T. A. Clarke, proctor for the captors.

P. Soule, proctor for the claimant.

MCCALEB, J.—This vessel was taken by the fleet under the command of Commodore Perry at Frontera de Tabasco, in the month of November last, and sent to this port for condemnation. The libel states "that pursuant to instructions for that purpose from the president of the United States and from Commodore Matthew C. Perry, commander of the United States steamship of war Mississippi, the libellant (Henry Rogers), with a cutter and crew belonging to the said steamship of war, did on the — day of November, 1846, enter the river Tabasco, within the territory of the republic of Mexico, and then and there seize and take the said Mexican schooner Amado, with all her apparel, tackle, furniture and cargo, consisting of cocoa, sugar, and other goods, wares and merchandise found lying in the said river Tabasco; that at the date of her capture the said schooner and her cargo were the property of citizens and residents of the republic of Mexico and enemies of the United States." For the reasons here alleged a decree of forfeiture is demanded on behalf of the captors and of the United States.

A claim and answer has been filed on behalf of one Jean Baptiste Capdebou by A. Capdeville, acting as his agent. In this, it is alleged, that the claimant is an alien absent from the state, but is the sole owner of the schooner and cargo: that he is a French citizen, and has been for some time past, engaged in trade in the republic of Mexico, under the protection of the treaties entered into by the said republic with the French government. It is further alleged, that in order to avail himself in the pursuit of his trade, of the advantages and facilities to be derived from transportation in Mexican bottoms, the claimant

402 DISTRICT COURT OF THE UNITED STATES.

Schooner Amado and cargo. Prize case.

purchased the schooner and sailed in her under Mexican colors: that since the commencement of the war between the United States and Mexico, he ventured the said schooner and the goods on board of her under Mexican colors, with the express permission of the American consul at Terra de Tabasco, and with the implied as well as express assent of the chief officers of the American squadron at Vera Cruz, who gave him a written protection in return for the good services which he had the good fortune to render them. He therefore contends that his property should be regarded as neutral, and as such not liable to confiscation.

The deposition of Benito Bosch (the master of the vessel), in answer to the standing interrogatories, shows that Capdebou, the owner of the vessel, is a Frenchman by birth, and has lived in Tabasco for thirteen years: that he does business in Tabasco: and that the goods on board were for his account and risk. This witness also declares that the schooner sailed under Mexican colors and had no other colors on board. We have thus the unequivocal declarations of both the claimant and the master, that the national character of the vessel was Mexican. Nor is this character destroyed by the alleged license of the American consul at Terra de Tabasco, to assume the flag of the enemy; nor by the permit of Capt. Gregory of the frigate *Raritan*, bearing date off Vera Cruz, June 2d, 1846, authorizing this schooner to pass from Vera Cruz to Guascualco, Tabasco, and to return. Neither the American consul nor the commander of the American frigate, had any authority whatever, by virtue of their official stations, to grant any license or permit, which could have the legal effect of exempting the vessel of an enemy from capture and confiscation. "To exempt the property of enemies from the effect of hostilities," says Sir WILLIAM SCOTT in the case of *The Hope*, "is a very high act of sovereign authority; if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who in legal language are termed *mandatories*, or by persons in whom such a power is vested in any official situation to which it may be considered incidental. It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power

in virtue of his station. *Ei rei non præparitur*; and, therefore, his acts relating to it are not binding. Neither does the admiral, on any station, possess such authority. He has, indeed, power relative to the ships under his immediate command, and can restrain them from committing acts of hostility, but he cannot go beyond that; he cannot grant a safeguard of this kind beyond the limits of his own station. The protections, therefore, which have been set up, do not result from any power incidental to the situation of the persons by whom they were granted; and it is not pretended that any such power was specially intrusted to them for the particular occasion. If the instruments which have been relied upon by the claimants are to be considered as the naked acts of these persons, then are they, in every point of view, totally invalid." *The Hope*, 1 Dodson.

It is, however, due both to the American consul and the commander of the frigate Raritan, to say, that from an inspection of the documents relied on as permits or licenses, they were evidently never intended to have the force and effect claimed for them by the proctor of the claimant. The one signed by the consul, and bearing date at Frontera de Tabasco, July 22d, 1846, is merely a recommendation of Capdebou to the favorable consideration of the officers of the American squadron on account of his having on many occasions, rendered friendly advice and pecuniary assistance to American citizens at a time when there was no American consul at the port of Tabasco. This letter of recommendation (for it is nothing else) concludes thus: "I have known Mr. Capdebou for many years, and my long acquaintance with him, has caused me to form so favorable opinion of him, together with the fact of his being a subject of our oldest and firmest friend and ally, France, that I am emboldened to hope and even to ask, that in case his vessel should be taken by any of you, gentlemen, you will, if your duty will permit it, suffer him to continue his voyage with his vessel and cargo, as he assures me he has nothing contraband of war on board of his vessel, her cargo consisting of the products of this department—principally cocoa."

If there be anything in this communication to entitle the claimant to the equitable consideration of our government, it is

to the executive or legislative department that his application must be made. Sitting as a court of prize, this tribunal can only be governed by the principles of the laws of war, and will look only to the legal effect of the evidence adduced. The permit from the commander of the frigate Raritan relied on by the claimant, is dated off Vera Cruz, June 2d, 1846, and is as follows: "The Mexican schooner Amado has permission to pass from Vera Cruz to Guascualco, Tabasco, with five persons composing her crew, and a family of passengers, with their effects; and the said schooner has permission to return."

Let us suppose for the sake of argument, that the legal effect of this permit would have been to exempt the vessel from liability to capture on the particular voyage she was then prosecuting; it would yet be most unreasonable to extend the privilege conferred by the very terms of the document itself. It was intended as an authority to the schooner to proceed from Vera Cruz to Tabasco, and to return to the former port, and yet I am called upon to give it a construction which would destroy the rights of captors acquired by a seizure of the vessel and cargo within the territory of the enemy, six months after it was granted, and when, I am bound to suppose, the particular voyage for which it was granted, had long been performed.

The deposition of the master showed that the schooner had on board a "national passport," that is to say, a passport from the Mexican government.

It is a well settled principle of the law of prize, that sailing under the flag and pass of an enemy, is one of the modes by which a hostile character may be affixed to property; for if a neutral vessel enjoys the privileges of a foreign character, she must expect, at the same time, to be subject to the inconveniences attaching to that character. The rule is necessary to prevent the fraudulent mask of enemy's property. "The existence and employment of such a license," says Mr. Justice STORY, in delivering the opinion of the Supreme Court of the United States in the case of *The Julia*, 8 Cranch, 199, "affords strong presumption of concealed enemy interest, or at least of ultimate destination for enemy use. It is inconceivable that any government should allow its protection to an enemy trade merely out

of favor to a neutral nation, or to an ally, or to its enemy. Its own particular and special interests will govern its policy ; and the *quid pro quo* must materially enter into every such relaxation of belligerent rights. It is, therefore, a fair inference either that its subjects partake of the trade under cover, or that the property, or some portion of the profits, finds its way into the channel of the public interests."

In the case of *The Saunders*, 2 Gallison, 214, the same learned admiralty judge decided that, by the general law of prize, as long as a vessel retains the hostile character consequent upon the use of an enemy's license, it is subject to all the penalties of such character ; and if captured *in delicto*, the vessel is confiscable *jure belli*.

In the case of *The Ariadne*, 2 Wheaton, 148, the Supreme Court of the United States held that sailing under the enemy's license, constituted, of itself, an act of illegality which subjects the property to confiscation, without regard to the object of the voyage, or the port of destination.

A distinction is made in the cases decided in the high Court of Admiralty in England between the ship and cargo. Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also. It is true that the decision of Sir WILLIAM SCOTT in the case of *The Elizabeth*, 5 Robinson, Ad. Rep. 2, does not carry the principle to that extent as to cargoes laden before the war. The rule laid down by that distinguished judge was to hold the ship bound by the character imposed upon it by the authority of the government from which the documents issue. Goods, which had no such dependence upon the authority of the state, might be differently considered ; and if the cargo be laden in time of peace, though documented as foreign property in the same manner as the ship, the sailing under the foreign flag and pass was not held conclusive as to the cargo. But let us suppose that the cargo, as in this case, belonged to the owner of the vessel, and were laden in time of war, and there is no reason to suppose that the rule of the English courts would have varied from that which has been recognized by the admiralty tribunals in this country. "The doctrine of the American courts," says Chancellor KENT, in his Com-

mentaries on the Law of Nations, lecture 4, 85, "has been very strict on this point, and it has been frequently decided that sailing under the license and passport of protection of the enemy in furtherance of his views and interests, was, without regard to the object of the voyage or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war."

But the proctor of the claimant has contended that his client is a subject of the French government, and as such is entitled to all the rights of a neutral. This position cannot be maintained. For all the purposes of argument it may safely be admitted that the claimant is still a subject of France; or in other words that he has never become a naturalized citizen of the republic of Mexico. Yet from the examination *in preparatorio*, it plainly appears that he has resided in Mexico for thirteen years; and there is no principle of prize law better settled than that the property of a person settled in the enemy's country, although he be a neutral subject, is affected with the hostile character. *The Ann Green and cargo*, 1 Gallison, 284. It is equally well settled that the property of a person may acquire a hostile character although his residence be neutral. Therefore, where a person is engaged in the ordinary or extraordinary commerce of an enemy's country, upon the same footing, and with the same advantages as native resident subjects, his property employed in such trade, is deemed incorporated into the general commerce of that country and subject to confiscation, be his residence where it may. And it was held by Mr. Justice STORY, in the case of *The San Jose Indiano*, 2 Gallison, 268, that if there be a house of trade established in the enemy's country, and habitually and continually carrying on its trade, with all the advantages and protection of subjects of the enemy, a shipment by such house on its own account, though one of the parties be resident in a neutral country, is purely of the enemy character; and the share of such partner in the property is not to be excepted from this thorough incorporation into the enemy's character. Mr. Wheaton, in his work on Captures, chapter 4, 101, says that the property of persons domiciled in the enemy's country, is liable to capture and condemnation, although such persons may be citizens

or subjects of the belligerent state or of neutral powers; and that a person who resides under the protection of a hostile country, for all commercial purposes, is to be considered to all civil purposes, as much an enemy as if he were born there. In the case of *Murray v. The Charming Betsey*, 1 Cranch, 65, the Supreme Court of the United States decided that a citizen residing in a foreign country might acquire the commercial privileges attached to his domicile, and thus be exempt from the operation of a law of his original country restraining commerce with another foreign country.

As the person who has a commercial inhabitancy in the hostile country has the benefits of his situation, so also he must take its disadvantages. *Qui commodum sentit, sentire debet et onus*, is the maxim of the civil law. Wheaton on Captures, 102. "It becomes important, in a maritime war," says Chancellor KENT, lecture 4, "to determine with precision what relations and circumstances will impress a hostile character upon persons and property; and the modern international law of the commercial world, is replete with refined and complicated distinctions on this subject. It is settled that there may be a hostile character merely as to commercial purposes, and hostility may attach only to the person as a temporary enemy, or it may attach only to property of a particular description. This hostile character, in a commercial view, or one limited to certain intents and purposes only, will attach in consequence of having possessions in the territory of the enemy, or by maintaining a commercial establishment there, or by a personal residence, or by particular modes of traffic, as by sailing under the enemy's flag or passport." And again he says: "If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character, and a subject of the enemy's country, in regard to his commercial transactions connected with that establishment. The position is a clear one, that if a person goes into a foreign country and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject to all civil purposes, whether that country be hostile or neutral; and he cannot be permitted to retain the privileges of a neutral character during his residence

and occupation in an enemy's country. He takes the advantages and disadvantages, whatever they may be, of the country of his residence. This doctrine is founded on the principles of national law, and it accords with the reason and practice of all civilized nations. *Migrans jura amittat ac privilegia et immunitates domicilii prioris*: Voet, Comm. Pand. Tome I, 347; 2 Dallas, 41.

According to Grotius, de J. B. ac. 568, all the citizens or subjects of the enemy, who are such from a permanent cause, that is to say, settled in the country, are liable to the law of reprisals whether they be natives or foreigners; but not so if they are only traveling or sojourning for a short time. And according to Molloy, de J. M. B. 1, c. 2, 16, it is not the place of any man's *nativity* but of his *domicil*; not of his *origination* but of his *habitation*, that subjects him to reprisal. The law doth not consider so much where he was born, as where he lives; not so much where he came into the world, as where he improves the world.

In the judgment of the lords of appeal, in prize causes, upon the cases arising out of the capture of St. Eustatius by Admiral Rodney, delivered in 1785, by Lord CAMDEN, he stated that "if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods; but a residence not attended with these circumstances, ought to be considered as a permanent residence." In applying the law and evidence to the resident foreigners in St. Eustatius, he said that, "in every point of view, they ought to be considered resident subjects. Their persons, their lives, their industry, were employed for the benefit of the state under whose protection they lived; and if war broke out, they continuing to reside there, paid their proportion of taxes, imposts and the like, equally with natural born subjects, and no doubt came within that description." Wheaton's International Law, 370.

It has been a question admitting of much discussion and difficulty, arising from the complicated character of commercial speculations, what state of facts constitutes a residence so as to change or fix the commercial character of the party. "Time," says Sir WILLIAM SCOTT in the case of *The Harmony*, 2 Rob.

The Bark Ohio.

Ad. Rep. 824, "is the grand ingredient in constituting domicile. In most cases it is unavoidably conclusive." And in that case that eminent civilian decided that four years were sufficient to fix the domicile of the party. The *animus manendi* is the point to be settled, and in the case of *The Bernon*, 1 Rob. Ad. Rep. 86, it was held that the presumption arising from actual residence in any place, is, that the party is there *animo manendi*, and it lies upon him to remove the presumption, if it should be requisite for his safety.

From the authorities here cited, it is clear that I am not called upon to take into consideration the *citizenship* of the claimant in deciding the point which has been urged with so much zeal by his proctor. His long residence of thirteen years in the enemy's country is amply sufficient to invest him, by the laws of war, with the character of an enemy, and subject him to all the disadvantages arising from that character. It is fully established that the vessel was captured within the limits of the enemy's country, when she was about to sail with her cargo under the protection of the flag and pass of the enemy.

I shall therefore condemn both vessel and cargo as prize of war to the captors.

THE UNITED STATES, Libelants v. THE BARK OHIO.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. M^CCALEB, JUDGE.

1. The United States district attorney for this district, filed a libel *in rem* against the bark Ohio, to have her declared forfeited, for having brought into the United States a colored person from a foreign port or place, in violation of the 1st section of the act of Congress of the 20th April, 1818 3 Statutes at Large, 450.
2. The provisions of this act were not intended to apply to a case where a colored person, born and reared within the United States, sails to a foreign port or place on board of an American ship and returns to a port of the United States.

410 DISTRICT COURT OF THE UNITED STATES.

The Bark Ohio.

3. And where it appears from evidence, that the negro boy came on board of the vessel in the port of Baltimore in the capacity of a servant, and that he had for several years resided in New Jersey or New York, in the family of the master of the ship, the presumption is that he was *free*, notwithstanding the declaration of the custom officer, that the master claimed him as his slave.
4. In no event can this libel *in rem* for a forfeiture, be sustained, since it does not appear from evidence, that the master, even if he brought the colored boy in question from a foreign port or place, did so on board this particular vessel.

Mr. Durant, proctor for the United States.

Mr. Bradford, proctor for respondent.

McCALEB, J.—This action is brought against the vessel to have her declared forfeited in consequence, as it is alleged, of her having brought into this port a colored person from a foreign port or place.

It is shown by two officers of the custom-house in this city, that when they went on board the vessel shortly after her arrival in port, that the master declared that the negro boy on board was his slave. This declaration unexplained would doubtless raise a strong presumption against the master, as to his intention of holding the negro in involuntary servitude. But all the evidence must be taken together. Two of the crew of the vessel were examined, and testified that the boy came on board the vessel at Baltimore as a servant, and had continued on board in that capacity during the voyage to several foreign ports and back to this port. Another witness testifies that he knew the boy as long ago as 1842 in the city of New York, where he was then employed as a servant in the family of the master. He also testifies that he was the son of a free woman in Rio Janeiro, who was herself employed in the family of the American consul at that port.

Without taking into consideration the testimony of the master or his wife, which was received subject to objection upon the ground of interest, I am unable to discover any violation of law so far as this *vessel* is concerned. It is not shown that this master while in command of this vessel, brought the negro boy from a foreign port or place. It is clearly shown, on the contrary, that the boy came on board in the capacity of a ser-

vant before the vessel sailed from the port of Baltimore. It is also shown that he was several years before that time residing in New Jersey or New York in the family of the master. The fair presumption on the mind of the court, notwithstanding the declaration of the custom-house officer, that the master claimed him as his *slave*, is, that he was *free* before he ever sailed on the last voyage of this vessel. There is nothing in the acts of Congress to prohibit the employment of colored people on board of an American vessel, and in this case, the master, at the earliest opportunity, gave bond to take this negro boy away with the vessel according to the requisitions of the state law.

Let us suppose that this boy was a slave when he left Baltimore; still, in the absence of all proof that he had been imported from a foreign port or place on board of this vessel, there would be no ground for forfeiture. If, by this master he were really imported in another vessel, there is no principle in law or justice which would justify the forfeiture of the property of the present innocent owners. Even regarding the boy as a slave when he sailed from Baltimore, the case before the court cannot be distinguished from that of the *United States v. The Ship Garonne*, 11 Peters, 73.

In that case certain persons, who were slaves in Louisiana, were by their owners taken to France as servants, and after some time, were by their own consent, sent back to New Orleans. The ships in which these persons were passengers, were libeled for alleged breaches of the act of Congress of April 20th, 1818, prohibiting the importation of slaves into the United States. It was held by the Supreme Court of the United States, that the provisions of the act of Congress do not apply to such cases. The object of the law was to put an end to the slave-trade, and to prevent the introduction of slaves from foreign countries. The language of the statute cannot be properly applied to persons of color who were domiciled in the United States, and who were brought back to the United States—to their place of residence—after a temporary absence.

In view of the law and evidence of this case, I am of opinion that no decree of forfeiture can be given against this vessel.

412 DISTRICT COURT OF THE UNITED STATES.

Bark Delphos.

UNION TOW-BOAT COMPANY, Libelants v. THE BARK DELPHOS.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. M'CALEB, JUDGE.

1. In a case of salvage, it is immaterial whether the master of the vessel requiring assistance formally surrenders the vessel into the hands of the salvors or not, if it appear that he called for assistance, and that neither he nor his crew actively participated in the salvage service. Their presence, merely, cannot be permitted to detract from the meritorious character of the services performed by the salvors.
2. The aid rendered to a burning vessel by tow-boats whose services were not actually required to rescue the vessel from her perilous situation, will be regarded as superfluous. And the court, in estimating the value of the tow-boats employed in the salvage service, will look to the evidence to ascertain how many were really necessary for the accomplishment of the object in view, and treat all others as supernumeraries, which being in sight of the burning vessel, rendered assistance not actually required.
3. While such assistance is not to be deprecated by the court, it cannot be received as a reason for increasing the estimate of the property put at risk, and thereby enhancing the claim of the owners for salvage compensation.
4. A tow-boat company cannot be treated as a salvor, but as the owner of property (their tow-boats), which is put at risk in the salvage service, are to be compensated like all other owners of vessels under similar circumstances.
5. Salvage is not always a mere compensation for work and labor. Various considerations: the interests of commerce and navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale.
6. The ingredients of salvage are: First. Enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow citizens. Secondly. The degree of danger and distress from which the property is rescued, whether it was in imminent peril and almost certainly lost, if not at the time rescued and preserved. Lastly. The value of the property saved. Where all these circumstances concur, a large and liberal reward ought to be given; but where none, or scarcely any take place, the compensation can hardly be denominated a *salvage* compensation. It is little more than a mere remuneration *pro opera et labore*. Sir JOHN NICHOLL, in the case of *The Clifton*, 3 Haggard, 117.
7. Mere speculative danger will not be sufficient to entitle a person to salvage; but the danger need not be such that escape from it by other means was impossible. It cannot be necessary that the loss should be inevitably certain; but it is necessary that the danger should be real and imminent. *Talbot v. Seamen*, 1 Cranch.

Bark Delphos.

8. It is rare that we find combined in a single case all the ingredients of a salvage service; but we must not, therefore, lose sight of those which prominently appear, from the evidence, to command our approval or elicit our commendation.

Cohen & Labott and Winthrop & Roselius, proctors for libelants.

Hunton & Bradford, proctors for respondents.

MCCALEB, J.—The libel in this case was filed on behalf of the Union Tow-boat Company, a limited copartnership established by an act of the legislature of Louisiana, approved the 13th of March, 1837, for the purpose of towing vessels by steam in and out to sea, and up and down the Mississippi river, and also lightening vessels in said river, or at sea, and carrying freight and passengers in the Gulf of Mexico, and elsewhere at sea. A claim for salvage has been set up by the company against the Bark Delphos, for the reasons which will appear from the following facts substantially proven by the witnesses examined on the trial of the cause.

On Thursday, the 3d of May last, at about 9 o'clock in the morning, while the tow-boat Conqueror, belonging to the libelants, was towing the bark in question from inside the bar of the South West Pass to sea, the latter was discovered to be on fire in the hold. By order of Captain Crowell, master of the bark, her head was immediately turned up stream; but, as the vessels were then in shoal water, it was found necessary to have the aid of another tow-boat, and the Ocean, also belonging to the libelants, was by a signal, summoned to the assistance of the Conqueror. Thus, by the co-operation of both tow-boats, the Delphos was carried back to an anchorage, under the direction of the branch pilot, in whose charge she was proceeding to sea when the fire was discovered. Captain Crowell being anxious to extinguish the flames without any other assistance than such as could be derived from his own officers and crew, immediately commenced searching for the fire under the main hatches and the cabin floor, but soon found it necessary to put the hatches on again. He continued his exertions to extinguish the flames by pouring water through the deck and cabin floor; but without producing any favorable result. Finding it impossible to

Bark Delphos.

subdue the flames, which were, indeed, every moment increasing, he called upon Captain Snow, the master of the tow-boat Conqueror, to save the bark if he could. It may be proper to add that he intimated, when he commenced his exertions with the means at his own disposal, he should ask assistance if those means should prove insufficient. The hose and pump of the Conqueror had been placed at his disposal, but he had used them without producing the desired effect.

As soon as Captain Snow was authorized to undertake the rescue of the bark from the danger, which the evidence shows was imminent, he immediately set to work with the crews of the Conqueror and Ocean, and all the pumps that could be brought into use. At this time the fire was increasing rapidly; and it was the unanimous opinion of all present, that the only effectual mode of saving the vessel that could be resorted to, under the circumstances, was to scuttle her, and let her sink to the deck. It was the opinion of several persons present, that there was not water sufficient to cover her; but as there was no time to remove her into deeper water, she was scuttled without delay and on the spot where she was then anchored. The deck and cabin floor were at the same time kept covered with water. As the bark took the mud on the bottom she settled very slowly. About sunset the tow-boat Hercules, also belonging to the libelants, came alongside and assisted with her pumps. From this time until 3 o'clock next morning, it required the most active exertions of not only the crews of the Conqueror, the Ocean and the Hercules, but also of the tow-boats Star and Claiborne (also belonging to the libelants), to keep the fire from breaking out. After 3 o'clock, the flames were so far subdued that the pumps of the steamer were worked only occasionally during that and the next day. At 7 o'clock on Friday morning the steam pumps belonging to the Star, of peculiar construction and extraordinary power, commenced working, and by 6 o'clock in the afternoon had succeeded in freeing the bark of water. Although she had both anchors out, there was a constant tendency of the bow of the bark down stream, because of the great weight of the water in the stern, and it was therefore found necessary to keep the tow-boat Ocean alongside the greater part of the day. On Friday

Bark Delphos.

evening after the water was pumped out, the bark was got under way and towed into deep water off the pilot's station, by the Ocean and Star, which remained alongside all night. On Saturday morning at about 9 o'clock, the Star started to the city with the bark and a small brig in tow, and arrived about 4 o'clock in the afternoon on Sunday. She remained alongside all night. On Monday morning there was considerable water found in the hold of the bark. This was removed by the steam pumps belonging to the Star, and by 12 o'clock the bark was left in safety alongside the levee.

The facts of the case as thus far stated, are substantially contained in the statement of facts, signed by Capt. Crowell of the bark and Capt. Snow of the Conqueror, and afterwards submitted to arbitrators appointed by the parties. They are mainly confirmed by the testimony of witnesses, and especially by that of Capt. Snow, who was sworn and examined before the court. Capt. Crowell was also examined as a witness under a commission, and denies that he called upon Capt. Snow to save the bark if he could, and declares that he objected to that particular part of the statement of facts after the claim of salvage was submitted to arbitrators, but before the award. Whether he said what is there stated be correct or not, is not material, when we consider what actually occurred. Whether he formally surrendered the vessel into the hands of the salvors or not, it is clear that he called for assistance, and it does not appear that either he or any portion of his crew, actively participated in the salvage service after Capt. Snow commenced operations. It is, however, proper here for me to remark that there was not what is usually denominated in admiralty law an *abandonment* of the vessel. The master and crew did not leave her *cum animo non revertendi*. This is then not properly a case of derelict in the sense of the maritime law. The master and crew of the bark were present while the salvage services were performed. But it is difficult to perceive wherein their presence merely can detract from the really meritorious character of the services performed by the salvors. According to the testimony of Mr. Park, the pilot at the South West Pass, if assistance had not been rendered by the tow-boats, the bark would have been a total loss in three hours. The tim-

Bark Delphon

bers were burnt and the mizzen-mast was on fire. The peril to which she was exposed was most imminent; and it is clear that she was rescued only by the timely assistance of the tow-boats. The evidence shows that there was great energy, promptitude and skill on the part of the salvors. The bark was so scuttled as to enable them to free her of the water when the flames were subdued; and this last important service was performed by the application of the powerful steam pump on board the tow-boat Star. It is proven by the testimony of Capt. Whitney of the Hercules, that the bark could not, without this machinery, have been raised. The persons engaged in giving assistance were almost constantly in the water, and greatly annoyed by the smoke from the burning cotton. I certainly cannot agree with the proctors of the claimants, when they contend that there was no risk of life and property incurred by the salvors. It is almost impossible to imagine the close proximity of human beings and of property like those tow-boats, to a vessel with a cargo of cotton on fire in her hold, without feeling a strong conviction that there must be danger. There would be danger from the sudden bursting up of the deck, which may naturally occur from the pressure of the intense heat produced by such a combustible as cotton in the pent up hold of a vessel; and there would be danger from the sudden breaking forth of the flames consequent upon such an explosion. The salvage services commenced at 9 o'clock on Thursday, when the Ocean was summoned to aid in towing the bark to an anchorage, and continued until 12 o'clock on Monday following, when she was finally left in safety at the levee. For about twelve hours only of the time here mentioned, however, were the salvors laboriously and energetically employed. During the balance of the time, not much more than ordinary vigilance and care were necessary to preserve the vessel and bring her to this port. I cannot assent to the ground taken by the proctors for the libelants, that the co-operation of all the tow-boats was required to save the vessel and cargo. This co-operation may be magnified into importance for the purpose of swelling the claim for salvage compensation by showing the great value of the property employed and put at risk in the salvage service. The co-operation of the Ocean with the Con-

Bark Delphos.

queror, I consider was indispensably necessary, to get the bark back to her anchorage; and it is quite clear that without the aid of the extraordinary pump on board of the Star, it would have been impossible to relieve the vessel of water after the flames were subdued by scuttling. The aid of the Hercules and Claiborne must therefore be regarded, to a great extent at least, as superfluous. They stand rather in the light of supernumeraries, which being in sight of the burning vessel offered and rendered assistance, which was not really demanded for the safety of the bark and cargo; and while such assistance is by no means to be deprecated by the court, it cannot be received as the basis for increasing the estimate of the value of the property put at risk and thereby enhancing the claim of the owners. Having reviewed as minutely as I deem necessary, the main facts of the case, I shall now present the law which must govern me in awarding compensation. And here, I am sorry to say, that the view which I feel bound to take of the case, differs widely from the positions assumed by the proctors of both libelants and claimants. While I am disposed to regard the services of the salvors as highly meritorious, it is yet clear that there is nothing in the record to show that there is a single salvor before the court claiming compensation for those services.

The libel sets forth the claim of the Union Tow-boat Company, and makes no mention whatever of the names or claims of the individuals who actively participated in the salvage service. There is no allegation and no proof that any of the salvors were even members of or stockholders in the corporation, which alone appears as libellant in the cause; and even if such allegation and proof appeared of record, the salvor who thus appeared to be member or stockholder, would not be allowed a compensation in the former character, unless his rights were distinctly asserted as such. His claim would otherwise be merged in that of the corporation as owner of the property employed and put at risk in the salvage service. To regard this corporation as a salvor and award it compensation as such, would in my opinion be contrary to all the well established principles of admiralty law regulating the action of courts in cases of this nature. It is doubtless entitled to a liberal reward for the employment and risk of its

property, but this reward must be fixed in accordance with the usual mode of distributing the whole amount of salvage compensation. Such was the course pursued by this court in the case of the ship *Charles*. In that as in this case, the actual salvors set up no claim for compensation, and it was contended by the proctors for the libelants, who were the owners of the tow-boat employed in the salvage service, that all the rights of the captain and crew of the tow-boat when not formally asserted by themselves, necessarily accrued to the owners. This principle was distinctly repudiated by the court, upon the ground that owners were usually allowed a certain proportion of the whole *quantum* of compensation awarded, and they had no right to claim that proportion which was exclusively due to the actual salvors if they had chosen to demand it. And the court declared that to act upon any other principle would be to award to cupidity that portion which modesty had declined receiving. The case was considered as if all the salvors had been before the court, a fair aggregate compensation was fixed, and of that compensation the proportion of one-third was awarded to the owners of the tow-boat.

The course pointed out by the case here cited, is the only one which can be safely and legitimately pursued in the case now under consideration. It is moreover the only course which can be adopted to secure uniformity in judicial decisions in cases which are confided by the law to the sound discretion of the court.

Let us proceed, then, to inquire what would be a fair salvage compensation if the actual salvors were before the court. And here I cannot assent to the position of the proctor for claimants, that the rates of towage usually charged by tow-boats can form even a basis upon which the court shall estimate the value of the services of the salvors themselves, or of the boats by means of which they were mainly enabled to perform those services. "Salvage," says Sir JOHN NICHOLL, in the case of *The Clifton*, 3 Haggard, 117, "is not always a mere compensation for work and labor; various considerations, the interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more en-

larged and liberal scale. The ingredients of salvage are: First, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures and to rescue the property of their fellow subjects. Secondly, the degree of danger and distress from which the property is rescued, whether it was in imminent peril and almost certainly lost if not at the time rescued and preserved. Thirdly, the degree of labor and skill which the salvors incur and display, and the time occupied. Lastly, the value of the property saved. Where all these circumstances concur, a large and liberal reward ought to be given; but where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation. It is little more than a mere remuneration *pro opera et labore*."

In regard to the degree of peril in which the property should be to authorize a claim for salvage compensation, I shall content myself with referring to the decision of the Supreme Court of the United States, delivered by Chief Justice MARSHALL, in the case of *Talbot v. Seeman*, 1 Cranch. In that case it was urged in argument, that to maintain the right to salvage, the danger ought not to be merely speculative, but must be imminent and the loss certain. In reply to this position, the chief justice said: "That a mere speculative danger will not be sufficient to entitle a person to salvage, is unquestionably true. But that the danger must be such that escape from it by other means was impossible, cannot be admitted. In all the cases stated, safety by other means was possible, though not probable. The flames of a ship on fire might be extinguished by the crew or by a sudden tempest. A ship on the rocks might possibly be got off by the aid of wind and tides without assistance from others. A vessel captured by an enemy might be separated from her captor, and if sailors had been placed on board the prize, a thousand accidents might possibly destroy them; or they might even be blown into a port of the country to which the prize vessel originally belonged. It cannot therefore be necessary that the loss should be inevitably certain; but it is necessary that the danger should be real and imminent."

Another principle by which courts of admiralty are governed

Bark Delphos.

and which leads to a liberal remuneration in salvage cases, is not to look merely to the exact *quantum* of service performed in the case itself, but to the general interests of navigation and commerce. The fatigue, the anxiety, the determination to encounter danger, the spirit of adventure, the skill and dexterity which are acquired by the exercise of that spirit, all require to be taken into consideration. It is rare that we find combined in any single case all the ingredients of a salvage service. But we must not therefore lose sight of those which prominently appear from the evidence to command our approval or elicit our commendation. The evidence in this case abundantly shows that there was promptitude, energy and skill displayed by some of the salvors, especially by Captain Snow, the *dux facti*, the strong prevailing mind that conducted the combined operations of the tow-boats; and in all there seems to have been no want of alacrity or zeal in the discharge of their respective duties. What is particularly to be considered in deciding upon the claim of the tow-boat company as owners, is the admirable equipment of their boats. They were well manned and provided with the necessary appliances to afford immediate and effective assistance to vessels in distress; and it is doubtless by the application of the extraordinary and powerful steam pump of the Star, that the salvors were enabled to raise the Delphos after she was sunk. If it be important upon principles of public policy and in view of the general interests of navigation, to encourage vessels thus provided and equipped to embark in salvage services, courts of admiralty should not lose sight of the great expense which must necessarily be incurred to keep them always in a state of preparation to afford assistance.

Upon a review of the whole case, I am clearly of opinion that a liberal compensation should be awarded. Property of the value of \$50,000 and upwards has been rescued from inevitable destruction by the timely assistance of the tow-boats. All suppositions that it might have been saved through some other agency, are merely speculative, and have no weight with the court. The claimants, however, have rights which must be protected. They have been unfortunate, and the court will not subject them to any further loss which may be inconsistent with

Steamboat T. P. Leathers and cargo.

a fair and equitable compensation to those through whose means they were saved from a greater calamity. It is the duty of the court to encourage active exertions in salvage cases, but not cupidity.

I think that under all the circumstances of the case, forty-five per cent. would be a fair and proper allowance, if all the salvors were before the court. Of this *quantum* I award the usual one-third to the libelants. I adhere to this proportion for the owners of the property engaged and put at risk in the salvage service, upon the authority of the great case of *The Blaireau*, which Mr. Justice STORY in most emphatic terms has declared should be the guide for all inferior courts except under very peculiar and extraordinary circumstances.

It is therefore ordered, adjudged and decreed that the libelants recover the one-third of forty-five per cent. on the value of the property saved—that is to say, one-fifteenth of the said value, after all expenses are deducted.

EDWARD MONTGOMERY *et al.*, Libelants *v.* THE STEAMBOAT T.
P. LEATHERS and cargo.

District Court of the United States. Eastern District of Louisiana.
In Admiralty.

HON. THEO. H. M'CALEB, JUDGE.

1. To constitute a derelict in the sense of maritime law, it is necessary that the thing be found deserted or abandoned upon the seas, whether it arose from accident, or necessity, or voluntary dereliction.
2. The abandonment of a steamboat by the master, to the care and protection of the master and crew of another steamboat for the purpose of procuring assistance and safety, is not a case of derelict.
3. In questions of salvage, no distinction can be made between the boat and cargo, both being subject to the same rule of law.
4. A salvage compensation can be awarded only to persons by whose agency and assistance the vessel or cargo may be saved from impending peril, or recovered after actual loss; and salvage will not be allowed unless the property be saved in

422 DISTRICT COURT OF THE UNITED STATES.

Steamboat T. P. Leathers and cargo.

fact by the parties who make the claim. Intentions, however good, and exertions even though they be perilous and heroic, are not sufficient to sustain a claim for salvage.

5. The drawing a boat off when aground, is a common act of courtesy among steamboats, for which no claim for salvage is ever asserted.
6. The surrender of the imperiled boat by its master, to the care and protection of the master and crew of the steamer Robb, virtually dissolved the contract between the surrendered boat and its pilot, and the pilot by important services subsequently rendered beyond the line of his duty, as such, is entitled to claim as one of the salvors.
7. The rate of salvage is not governed by the mere extent of labor. The value of the property saved, the degree of hazard in which it is placed, the enterprise, intrepidity and danger of the service, and the policy of a liberal allowance for timely interposition of maritime assistance, all conspire to increase the amount of the salvage. When the value of the property is small and the hazard great, the allowance is in greater proportion; on the other hand, when the value is large and the services highly meritorious, the proportion is diminished.

Mr. Benjamin, proctor for salvors.

Mr. Durant, proctor for respondent.

MCCALEB, J.—The libelants in this case claim a salvage compensation for services rendered in saving from loss by fire, the steamboat T. P. Leathers. It appears from the evidence, that the steamboat James Robb, while prosecuting her voyage from this port to that of Louisville, Kentucky, on the 13th of June last, discovered the Leathers on fire, at College Point, about sixty miles above this city. The discovery was made about two o'clock in the morning. The Robb, upon being hailed by the Leathers, went to her assistance, and found her in a very dangerous situation; the fire was in her hold, and all efforts to extinguish the flames had proved ineffectual; she had been run hard ashore on a sand bank, with a view to save the lives of those on board; she had been scuttled by boring into her a number of large auger holes, for the purpose of extinguishing the fire. All the steam and water from her boilers had been exhausted by being discharged into her hold; by this means the flames were at first partially subdued, but again broke out as fiercely as before; she had already obtained the assistance of the steamboat St. Charles, which had vainly endeavored to pull her

off the sand bank and extinguish the fire. When the Robb arrived, the flames had made such progress as to render inevitable the destruction of the Leathers and that portion of the cargo which had not been removed by the St. Charles. The Leathers was commanded by Captain J. F. Leathers, but when the fire broke out, he requested his older and more experienced brother, who was on board as a passenger, to take command. This request was complied with, and the latter had the control of the burning boat when the Robb arrived. With the assistance of his brother, he was engaged in doing all that skill, experience and energy could accomplish, with the means at his disposal, in rescuing the boat and cargo from impending peril. At his request, the Robb, aided by the St. Charles, hauled the Leathers off the sand bank. She took on board the passengers, and a large portion of the cargo from the deck of the Leathers, which had not been previously taken off by the St. Charles. She pumped the boilers of the Leathers, which were empty, full of water, and after giving all the assistance she could for about four hours, was on the eve of leaving the Leathers and prosecuting her voyage to Louisville, when the captain of the Leathers requested Captain Montgomery not to leave, as it was perfectly apparent the boat must inevitably be destroyed without the superior equipments of the Robb, to aid in putting out the fire. The testimony of Captain Leathers shows that he had no hopes whatever of being able to save the boat without that aid which the Robb only could render. He therefore came to the conclusion to abandon the burning boat to Captain Montgomery, of the Robb, that he might do with her whatever he might deem expedient, with a view to her final safety.

Captain Montgomery thereupon took possession of the Leathers, and with all the means and machinery of the Robb, resorted to every device which skill and ingenuity could suggest to save her. It may be proper here to remark, that the Robb is the only boat on the Mississippi provided with an extra steam engine to furnish steam and water for extinguishing fires. This engine, with its boiler, the main engine and its boilers, and the small engine called the doctor, on the Robb, were all fitted up with extra pipes leading into the hold of the Leathers. The two

main engines of the Leathers and her doctor, were also fitted up with similar pipes, which were made to lead into her hold. Steam was then raised in the boilers on both boats, and an unremitted discharge of steam and water kept up. By this means, the flames were in a great measure subdued, but not entirely extinguished. The heat in the hold was so intense, and the smoke so suffocating, as to render it impossible for any one to go below. It was deemed advisable, therefore, to fill the hold with water as the only means of entirely putting out the fire. The Leathers was then towed by the Robb from College Point, where she had been stranded, to Valcour Aime's plantation, six miles lower down the river, to a sand bank where there was about six feet of water. While the boat, however, was proceeding down the river to the point here designated, it was found that the current of air created by her motion had the effect of driving back from the hatches the steam and smoke; and Captain Montgomery determined, though at considerable hazard of his life, to take a hose and descend into the hold, that he might thus be enabled more effectually to direct a stream of water upon the burning cargo. He was urgently warned not to do so by the officers of the Leathers, who informed him that there were barrels of turpentine in the hold; and notwithstanding the peril he incurred, he called for volunteers to aid him in the accomplishment of his purpose, and followed by James Dean, the pilot of the Robb, James F. Smith, her first clerk, James K. Moody, second clerk, Marshall Johnson, her first engineer, and Chas. Pierce, pilot of the Leathers, descended into the hold with a hose in his hand, while Dean was provided with another. They were thus enabled, with the assistance of the other men, Smith and Johnson, Moody and Pierce, to direct a perpetual stream of water upon those articles of merchandise which were actually blazing. They were thus enabled by constant exertions for several hours, to extinguish the flames entirely, and save the boat and that portion of the cargo not already taken on board the Robb. The gallantry and intrepidity displayed by Captain Montgomery and his associates, will be fully appreciated by a reference to the fact disclosed by the evidence, that some of the barrels containing turpentine were on fire, and had their hoops burnt off. The

Steamboat T. P. Leathers and cargo.

water in the hold of the Leathers was then pumped out, the freight which had been taken from her on board the Robb was returned to her, and after about thirteen hours of unremitted labor, the Robb continued her voyage to Louisville, in charge of her mate, while Captain Montgomery took command of the Leathers, and brought her down in safety to this port.

The facts here detailed, and the testimony of the witnesses not particularly referred to, are such as to justify the court in regarding the services of the salvors as in the highest degree meritorious. It cannot be denied that almost all those ingredients of a salvage service, which in the opinion of a court of admiralty, enhance the claim for compensation, were strongly presented on the trial of this cause. The danger to the property rescued was imminent. The testimony of Captain Leathers shows clearly that it would inevitably have been destroyed but for the timely assistance of the salvors. In the conduct of Captain Montgomery were displayed all those qualities of skill, energy, intrepidity and gallantry, which ever have and ever will, appeal most strongly to the equitable consideration of courts in awarding a salvage compensation. The same qualities were exhibited, though not to the same extent, by those who promptly responded to his call for volunteers, and faithfully executed his orders. The proctors for the respondents have with commendable liberality, admitted that the services performed by the salvors were of a highly meritorious character, and that a liberal remuneration should be awarded. They have, however, very properly contended, that this is not a case of a derelict, as that term is understood in the maritime law, and however much I may feel inclined to regard with favor the services of these salvors, it is my duty to adhere as closely as possible to the well established principles of law. I cannot give to the case any other character than that which the law has given it. If it could be considered as a case of derelict, I should perhaps have little hesitation in decreeing the usual proportion of a moiety. But a glance at the law will show, that it would be a deviation from all precedent thus to regard it.

To constitute a derelict in the sense of the maritime law, it is necessary that the thing be found deserted or abandoned upon the

seas, whether it arose from accident or necessity, or voluntary dereliction. Sir WILLIAM SCOTT, in the case of *The Aquila*, 1 Rob. 87, declared that a legal derelict is, properly, where there has been an abandonment at sea by the master or crew, without hope of recovery. With the view, for which the words "without hope of recovery," are introduced, viz: to distinguish a temporary absence from a permanent abandonment, it might, perhaps, have been more proper to have said, an abandonment without the intention of returning, since the *spes recuperandi* might exist even though the abandonment were without such intention. In another case, that of *The Jorge Johannes*, 4 Rob. 216, the same learned judge seems to have entertained an opinion, that if a vessel be captured, and afterwards abandoned by her captor, it is not properly a case of derelict; because neither the owner nor those who were in possession as his agents, have committed any act of dereliction. So that in this view, to constitute a derelict, there must be a voluntary abandonment by the master and crew. But this opinion, as appears from later cases (*The Lord Nelson*, Edw. 79, and *The Blendenhall*, 1 Dodson, 414), has been silently retracted; and certainly it is not the recognized doctrine in this country. Sir Leoline Jenkins has given a true definition in its most broad and accurate sense, when he says derelicts are boats or other vessels forsaken or found on the seas without any person in them." Works of Sir L. Jenkins, Vol. I, 89. It is true that the civil law attached a very different sense to the term; for a thing was not a derelict in that law unless the owner voluntarily abandoned it without any further claim of property in it. *Pro derelicto autem habetur quod dominus ea mente abjecerit, ut id in numero rerum suarum esse nolit* (Inst. of Justinian, Lib. 2, 681, § 46), and, therefore, a thing cast overboard in a storm to lighten a vessel, was not esteemed a derelict. *Rome et al. v. The Brig* —, 1 Mason, 272.

In the case now under consideration, the boat on fire was found in possession of her captain and crew, who never left her at any moment from the commencement of the danger until the final extinguishment of the flames. It is true that Captain Leathers abandoned her to the possession of Captain Montgomery, under the conviction that nothing could be effectually done

Steamboat T. P. Leathers and cargo.

for her safety, without the admirable equipments of the Robb. But such an abandonment can, in no just or legal sense, be considered as sufficient to satisfy us in regarding the boat as a derelict—that is deserted by her captain and crew *sine animo revertendi*. A case of the total abandonment of a vessel upon the Mississippi must very rarely occur, especially where, as in this instance, she is stranded near the shore. The inducements to seek safety by the desertion of a ship in flames on the high seas, or driven about in a helpless condition by storms, or wrecked on the coast of the sea, can never exist on our public navigable rivers. Being satisfied that this is not a case of derelict, I shall, instead of a moiety, award one-third of the proceeds of the property saved to the salvors, to be distributed as hereafter directed.

The position assumed by the proctors of the claimants of a portion of the cargo, that a distinction should be drawn by the court between the boat and cargo, cannot be recognized as the correct rule, in cases of this nature. I know no precedent for the establishment of such a rule, and the learned proctors have referred to no authority in support of their position. The reason advanced for the distinction, which it is contended should be drawn, is the fact that less exertion and risk were necessary in saving that portion of the cargo which was placed upon the deck of the Leathers. There is scarcely a case of salvage that ever came before a court of admiralty, in which this distinction would not have been applicable; and yet, we find the uniform rule to be, to consider the service performed in rescuing the vessel and cargo, as one general salvage service, to be compensated by awarding a certain *quantum* of the proceeds of the whole property. I have searched with diligence for authorities upon this point, and the only case I have discovered, is that of *The Vesta*, decided by Sir CHRISTOPHER ROBINSON. 2 Haggard, 295. The decision was given upon an appeal from the commissioners, and although the learned judge confirms the action of these commissioners for satisfactory reasons, he is clear in the expression of an opinion adverse to the principle contended for by the proctors in this case. He maintains, that it is not a correct principle in determining the amount of salvage, to give specific proportions of different parts of the property saved as of

the ship and cargo, and the different parts of the cargo. Such a rule is inconvenient in itself, and must lead to error, unless checked by proper attention to the adequacy of the remuneration so assigned, according to the circumstances of the particular case. The more usual and better rule is, to make a valuation on the whole property.

"Suppose," says the judge, in illustration of his views on this point, "a casket of jewels on board, and which might be saved with great facility; it could not, in such case, be contended that the salvors would only be entitled to a small gratuity for carrying it on shore. To uphold such a notion would lead to preferences in saving one part of a cargo before another." I shall, therefore, adhere to the usual rule, and decree compensation out of the whole proceeds of boat and cargo; and I shall do so with greater satisfaction, because it appears from the testimony of Captain Leathers, that there existed the strongest apprehensions that the deck of the burning boat would fall in, and the cargo on the deck could only be saved by directing a constant stream of water into the hold, by the operations of the engine and hose of the Robb. I come now to consider the claim of the St. Charles to be considered as a salvor; and I shall proceed to state as briefly as possible, the reasons why, in my judgment, the claim cannot be admitted. A salvage compensation can be awarded only to persons by whose agency and assistance the vessel or cargo may be saved from impending peril, or recovered after actual loss, as in cases of shipwreck, derelict or recapture. It is well settled, that unless the property be saved in fact, by those who claim as salvors, salvage will not be allowed, be their intentions however good, and their exertions however heroic and perilous. 4 Wash. 651. The evidence shows that a large portion of the cargo on deck, was taken on board of the St. Charles. But by an agreement between Captain Leathers and Captain Applegate, commanding the St. Charles, that portion of the cargo was transported by her to its place of destination, and her captain and owners were to be compensated by receiving the freight which was chargeable thereon. This freight was doubtless received. Whether it has been or not, it is certain that no claim for salvage has or could now be asserted against

Steamboat T. P. Leathers and cargo.

that portion of the cargo. It can hardly be contended that the Leathers and the balance of the cargo were saved when the *St. Charles* left her. The testimony of Captain Leathers on this point, is too explicit to admit of a doubt. The *St. Charles* aided the *Robb* in drawing the Leathers off the sand bar; but we are told by the pilot of the Leathers, that the power of the *Robb* was sufficient without her. Besides, the drawing a boat off when aground, is a common act of courtesy among steamboats, for which no claim for salvage is ever asserted. If the services of the *Robb* had extended no farther than this simple and usual act of courtesy, it is hardly probable that she would have asserted any claim for salvage compensation. But she persevered unto the end. She not only rendered the services alluded to by the witnesses, but it was by those services that the property against which she has filed her libel was actually saved from impending peril. I am of opinion that the *St. Charles* has already been amply compensated by the amount of freight she has received upon that portion of the cargo which by agreement with Captain Leathers—an agreement which seems at the time to have been perfectly satisfactory to both parties—she was to carry to its point of destination.

The proctors for the claimants of a portion of the cargo, have urged upon the court the propriety of decreeing salvage to the crew of the *Robb*. I cannot perceive upon what ground their clients are interested in securing to the crew their customary proportion of the compensation awarded, except upon the supposition that as that proportion has not been claimed, it will enure to the benefit of the claimants. But if by the evidence the crew were placed before the court as salvors, I should feel it my duty to have their proportion retained in the registry, subject to their orders, and in no event would I feel myself authorized to order it into the hands of the claimants. The evidence, however, does not justify the court, in this instance, in considering the crew as salvors. They have asserted no claim as such, and the fair presumption is, that, not having performed any service beyond the ordinary line of their duty, they have no demand to make beyond their ordinary wages. If, indeed, the court could feel itself called upon to award to them a compensation, the amount

would necessarily be about the proportion of stipulated wages, which, for about thirteen hours, would be too insignificant to be taken into account in a case like this. I have felt it to be a sacred duty to guard the rights of the crew in all cases in which they could at all be regarded as salvors. And in the case to which the proctor has referred, I refused to award to the owners of the tow-boat the amount of salvage compensation which was justly demanded by the crew, under the belief that they would eventually claim as salvors, and because I was convinced their claims had not been properly presented by those whose duty it was to protect their rights. The only persons who now appear before the court as salvors, are Captain Montgomery, the men whose names have already been mentioned, and Hamilton Smith and Isaac Darrimore, the mate and carpenter. These two last did not descend into the hold of the Leathers, but rendered prompt and efficient assistance in executing orders above, and especially in cutting holes in the deck. They incurred no real danger, but were active and useful in their appropriate sphere. Charles Pierce, although a pilot on the burning boat, is clearly entitled to be regarded as a salvor. His original contract with the boat, on which he was employed, was virtually dissolved by the surrender of the boat into the possession of Captain Montgomery; and there seems to be no doubt that he performed important services beyond the line of his ordinary duty. I shall, therefore, place him upon an equality with James S. Smith, Marshall Johnson and James K. Moody. After Captain Montgomery, the real *dux facti*—the strong prevailing mind that led throughout the enterprise—I consider the pilot of the Robb, James Dean, as first entitled to the favorable consideration of the court. He was the first to respond to the call of Captain Montgomery for volunteers, and to follow him into the hold. He also had charge of a hose, and amid the intense heat and suffocating smoke, continued, with great fortitude and energy, to discharge his duty until the flames were finally extinguished.

Since the decision of Lord STOWELL in the case of *The Raikes*, it has become customary with courts of admiralty to award a liberal compensation to the owners of steam vessels to induce them to embark in a salvage enterprise and thus enlist their

Steamboat T. P. Leathers and cargo.

powerful and efficient aid in rescuing life and property from impending peril. The case now under consideration is one in which a higher proportion than one-third should be awarded to the owners of the salving boat. The superior engine of the Robb and her other excellent and extensive equipments, all so admirably adapted to the service in which she was employed, will, I think, justify me in deviating from the ordinary rule of one-third, and giving to her owners one-half of the salvage compensation awarded. It should also be remembered, in further justification of this rule, that her exertions to save the property in this instance worked a forfeiture of her insurance. As already intimated, I shall decree one-third of the proceeds of the boat and cargo saved free of all expenses and charges, as the aggregate of salvage compensation; and of this one-half having been decreed to the owners of the Robb, I shall divide the other half into thirty shares, of \$250 each. I give—

To Captain Montgomery	12 shares
James Dean, pilot	4 "
James S. Smith	3 "
Marshall Johnson	3 "
James K. Moody	3 "
Charles Pierce	3 "
Hamilton Smith	1 "
Isaac Darrimore	1 "

—
30 shares

Thirty shares of \$250 each, are equal to \$7,500. The whole value of the property saved has been estimated at \$45,000. The owners of the Robb will receive the other half of the third allowed, viz: \$7,500.

In making this decree, I have endeavored to give what I consider, under all the circumstances of the case, a liberal reward to the salvors, and at the same time protect the rights of the unfortunate owners. It is well established that the amount of salvage rests in the sound discretion of the court. The rate is not governed by the mere extent of labor, but is a result from the combination of various considerations. The value of the property saved, the degree of hazard in which it is placed, the

Carroll, Adams et al. v. Steamboat T. P. Leathers.

enterprise, intrepidity and danger of the service, and the policy of a liberal allowance for the timely interposition of marine assistance, all conspire to heighten the amount. Where the value of the property is small, and the hazard is great, the allowance is always in greater proportion. On the other hand, where the value is large, and services are highly meritorious, the proportion is diminished.

D. R. CARROLL, surety and seizing creditor, and R. W. ADAMS and others, Interveners v. THE STEAMBOAT T. P. LEATHERS.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. MCALEER, JUDGE.

1. Where a surety on a bond or stipulation given in the admiralty, pays the money in accordance with the decree of the court, he is entitled to be subrogated to the rights of the original libelants; but he cannot be paid by preference out of the proceeds of the boat which has been sold under his execution, while there are liens already existing.
2. The moment the boat was released upon a stipulation, from the custody of the law, she was also released from the lien in favor of the original libelants, and they could only have recourse upon the stipulation. The boat was at liberty to go where she might think proper, and *quoad* the claim of the original libelants, was at liberty to contract *de novo*, debts which might operate as liens in admiralty or under the local law.
3. The claimants of a boat libeled for salvage, upon giving a stipulation for her release from the custody of the law, take her *cum onere*, subject to pre-existing liabilities.
4. The surety on a stipulation who has paid money for his principal, can only be regarded as an ordinary creditor of the principal, upon whose personal credit he relied when he bound himself for the payment of the obligation. His right to be paid out of the proceeds of a boat which has been sold under his execution, must be regarded as subordinate to the claims of the interveners who have established their liens.
5. It is the surety's own fault if he fails to exact of his principal a separate stipulation to indemnify him against loss; and although the rules in admiralty are silent with regard to this form of stipulation, yet as a familiar and well established part of the civil law and general admiralty practice, the court would not hesitate upon the application of the surety to direct it to be given.

Carroll, Adams et al. v. Steamboat T. P. Leathers.

6. When supplies are furnished to a vessel in her home port, the validity of the liens must be determined by the local law; but when they have been furnished in a foreign port, or in the port of a state other than the one to which the vessel belongs, the liens are to be regarded as admiralty liens, which are unaffected by any limitations of the local law.
7. If A. hold a lien against a vessel for materials furnished, and the master request B. to pay the account of A., the lien originally held by the latter is not by such payment transferred to B., and he has no right of action *in rem* in the admiralty.

Durant & Hornor, proctors for libellant Carroll.

Benjamin, Micou & Finney, proctors for Relf and Villarubia, interveners.

McCALEB, J.—In the case of *Montgomery and others v. The Steamboat T. P. Leathers*, ante, p. 421, this court awarded a salvage compensation of \$15,000, free from all costs and charges; and for this sum together with costs, making an aggregate amount of \$15,834.80, an execution issued against the principal and surety on the bond, which was given by the claimants when they obtained the release of the boat from the custody of the law. The present libellant as surety, was compelled to pay into court the whole sum demanded under the execution, and upon the motion of his proctors was subrogated by an order of court to all the rights of the original libelants. He then applied for and obtained an execution against his co-sureties and the owners of the boat, which was levied upon to satisfy that proportion of the amount awarded to the original libelants, and due from her.

It is proper that I should state that the judgment in favor of the salvors, as it was entered by the clerk, so far as it gives a lien upon the boat, goes further than the law or the practice of the court will authorize. As soon as the stipulation was filed by claimants, and the boat released from custody, the lien in favor of the libelants was discharged. But as that judgment can only conclude those who were parties to the original suit, the clerical error committed in entering it upon the record, cannot be permitted to affect the interests of those engaged in the present controversy. The proper remedy, after the boat was released, was upon the bond or stipulation; and the record shows that this remedy was regularly pursued. Having paid the money as

surety, D. R. Carroll could at once claim to be subrogated to the rights of the original libelants. This part of the proceedings, has been strongly attacked by the proctor of one of the intervening parties who asks to be paid in preference to the surety on the bond. It is contended that no such right of subrogation accrued to the surety, and that the sale of the boat under his execution was totally irregular. If this be so, then the intervener is in the act of asserting a claim by preference, to the proceeds of a sale, which he himself contends was made without the authority of law. But the order of subrogation was regular, and fully authorized by the jurisprudence of the admiralty tribunals, which are governed on this subject, not, as the proctor has contended, by the principles and rules which are administered in courts of equity, but by the well recognized doctrines of the civil law code. "The practice of the court," says Judge WARE, in *Lane v. Townshend*, Ware's Rep. 294, "is the law of the court, and in the absence of any authoritative decisions showing what that is on a particular point, we must resort to the general rules of admiralty practice, and the principles of that jurisprudence from which it is derived."

By the act of Congress of 1789, regulating the practice of the courts, the forms and modes of proceeding in causes of admiralty and maritime jurisdiction, are directed to be "according to the course of the civil law;" and in that of 1792, they are ordered to be "according to the principles, rules and usages of the courts of admiralty as contradistinguished from courts of common law;" subject to such alterations as courts in their discretion should deem it expedient to make.

The sections quoted by the learned proctor from 1 Story's Equity Jurisprudence, § 4996, &c., show clearly the rules of the chancery courts; but in the same volume, section 500, we have presented to us in language not to be misunderstood, the far more liberal and comprehensive doctrine which pervades the Roman law in reference to this subject. Not only is the surety by that law entitled in such cases to the benefit of all the collateral securities taken by the creditor; but he is also entitled to be substituted as to the very debt itself, to the creditor, by way of cession or assignment. And upon payment of the debt by

the surety, the debt is in favor of the surety, treated not so much as paid as sold; not as extinguished, but as transferred with all its obligatory force against the principal. After quoting at length from the Digest of Justinian the provisions of the Roman law, which support this view of the subject, Mr. Justice STORY says: "We have here the doctrine distinctly put, the objection to it stated, and the ground upon which its solution depends, affirmed. The reasoning may seem a little artificial; but it has a deep foundation in natural justice. The same doctrine stands in substance approved in all the countries which derive their jurisprudence from the civil law." 1 Story's Eq. § 500; Digest lib. 46, tit. 1, l. 17, 36; Pothier Pand. lib. 46, tit. 1, n. 46; 1 Domat, B. 3, tit. 1, § 3, art. 6, 7. The Louisiana Code, art. 2157, declares that "subrogation takes place of right for the benefit of him who, being bound with others or for others, for the payment of the debt, had an interest in discharging it."

Thus far then I have no hesitation in saying that the proceeding on behalf of the subrogated surety was regular and proper. But the question now to be determined is, can he be paid by preference out of the proceeds of the boat sold under his execution while there are liens already existing? After a very full examination of the questions discussed at the bar, I am of opinion that no such preference can be allowed. The order of subrogation gave him all the rights of the original libelants. But the moment the boat was released upon bond, she was also released from the lien in favor of the salvors, and they could only have recourse upon the bond. The boat was at liberty to go where she might think proper, and *quoad* the claim for salvage was perfectly free to contract obligations which would subject her *de novo* to liens in admiralty or to privileges under the laws of the state. Even as to liens existing prior to the filing of the libel for salvage, the claimants, upon giving a stipulation for her release from the custody of the law, received her, *cum onere*, subject to all such pre-existing liabilities. Conkling's Adm. 770, 771; Benedict's Adm. §§ 497, 447; 2 Mason, 57. The surety, therefore, can only be regarded in the light of an ordinary creditor of his principal, upon whose personal credit he relied, when he bound himself for the payment of the bond.

His right to be paid out of the proceeds of the boat which has been sold under his execution, must be regarded as subordinate to the claims of the interveners, who have established their liens. If any injury shall eventually accrue to him in this case, the court can only express regret at its inability to relieve him. It is his own fault if he has failed to exact of his principal a separate stipulation to indemnify him against all loss. And although the rules are silent with regard to this form of stipulation, yet as a familiar and well established part of the civil law and general admiralty practice, the court would not have hesitated, upon his application, to direct it to be given. Conkling's Adm. 462, 468. He has the same right to proceed against the boat which has been seized and sold in this case, as against any other property belonging to his principal; but it is the right of an ordinary, and not of a privileged creditor holding a lien.

I shall now proceed to consider the different claims of the intervening libelants.

In reference to *supplies*, it is only necessary to state as a general principle, that where they have been furnished in the home port of the vessel, the validity of the liens must be determined by the local law. But where they have been furnished in a foreign port, or in the port of another state than the one to which the vessel belongs, the liens are to be regarded as admiralty liens which are unaffected by any limitations of the local law. The home port of this boat is Memphis in the state of Tennessee. The local law of that state (Statute of 1833, chap. 85, § 1) gives a lien on steamboats for any debt contracted by the master, owner, agent or consignee, for any work done or materials or articles furnished for or towards the building, repairing, fitting, furnishing or equipping the same, and for wages due to the hands, provided suit shall be commenced therefor within three months from the time the work is finished, or materials, or articles are furnished, or the wages fall due. The supplies furnished in the port of Memphis will be tested by this law. Those furnished in the port of New Orleans, will be regarded as falling within the principles of the general maritime law. The lien they give is unaffected by the limitations of the local law as to the time within which the action is to be brought.

One of the claims asserted by Relf & Co., has been resisted upon the ground that it was for money not actually loaned to the master for the necessities of the vessel, but paid to Filkins and others for materials furnished and repairs done upon her by the authority of the master. The evidence shows that the account of Filkins and others was settled by Relf & Co., at the request of the master; and it is difficult to draw a distinction between a claim for money so paid and one arising from a direct loan to the master for the specific purposes to which the money was really appropriated. In either case, it would seem to be an advance of money for the necessities of the boat, made at the request of the agent legally authorized to contract for the materials and repairs. But the question arises, upon what principle of the maritime law can this court authorize the payment of the claim? It is money advanced for the necessities of a vessel in a foreign port, and the lender has failed to acquire a lien by taking a bottomry bond. The fair presumption then is, that he made the advance upon the personal credit of the master and owners. If the claim be grounded upon the law of the state, it must appear, that the money was lent to the master for the necessities of the boat during the last voyage. There is no evidence to show that the claim falls within the particular provision of the Code (art. 3204, No. 7), which must be construed strictly. The court has no authority to substitute Relf & Co., in the place of Filkins and others, to whom the money was paid, so far as to transfer to them the lien which the latter held against the boat. I feel compelled, therefore, to reject this claim, and leave the interveners, Relf & Co., to their remedy against the master and owners. *Harper v. New Brig, Gilpin R.*

The claims will now be referred to Robert M. Lusher as commissioner in admiralty, to be arranged in accordance with this opinion, and to be presented in the form of a report which will serve as the basis of a final decree.

NOTE.—This decree was, on appeal to the Circuit Court, affirmed by Mr. Justice CAMPBELL.

488 DISTRICT COURT OF THE UNITED STATES.

Proceeds of Bark Pandora.

JOHN B. EMERSON *et al.*, Libelants *v.* The Proceeds of the Sale
of BARK PANDORA and cargo.

District Court of the United States. Eastern District of Louisiana.
In Admiralty.

HON. THEO. H. MCALEB, JUDGE.

1. Where the master of a vessel on fire gives authority to another to save what he can, and look to the property he may be enabled to save for his compensation, the person thus authorized is to be regarded in the light of a *salvor*, and is to be compensated as such out of the proceeds of the property saved.
2. The owners of a steamboat, for services in towing a burning vessel from one shore of the river to the other, are entitled to a reasonable compensation for towage; but they are not, for that service alone, entitled to salvage.
3. The claim of the stevedore for loading and unloading the vessel, and that of a commercial firm for supplies furnished her, before the fire which rendered necessary the services of the salvors, cannot be permitted to interfere with the claims of the latter, but may be paid out of any remnant in the registry.

Mr. Durell, proctor for libelants.

Mr. Bright, proctor for respondent.

MCALEB, J.—The libelants in this case claim a compensation for salvage services rendered in saving from loss by fire the bark Pandora, of Liverpool, on the 26th of December last. The vessel had on board a cargo of cotton, and was lying in this port, moored at the wharf, when she was discovered to be on fire. By order of the proper authorities of the city, she was towed across the river, near to the opposite shore. The libel states, that at about 11 o'clock, A. M., the said bark being on fire fore and aft, with main and mizzen-mast burned off and in the water, was abandoned, together with her cargo, by her master, Captain Wemyss, to the libelant, for the purpose of saving, if possible, some part thereof: that the libelant thereupon consented to render such assistance as was in his power, and immediately took possession of the bark and proceeded to scuttle her; but,

Proceeds of Bark Pandora.

finding it impossible to sink her, in consequence of the rapid progress of the flames, he engaged the services of other men, and with them continued to watch her, and to throw water upon the flames until they were extinguished, and the hull of the vessel and a portion of the cargo, to wit: — bales of cotton, finally saved in a damaged condition.

The libel further alleges, that at the request of the master of the bark, and for the purpose of saving expense, the libelant consented that the bark and cargo thus saved, through his exertions, should be sold, he at the same time reserving his lien upon the proceeds: that the sale accordingly took place, and the proceeds thereof amounted to the sum of \$1,525. He further avers, that in consequence of the great risk and expense he incurred in saving the bark and cargo, he is entitled to receive a compensation of seventy-five per cent.; but that the owners, through their agents, refuse to pay the same, or any part thereof.

The respondent, as owner of the bark, denies that the vessel was ever indebted to the libelants, and avers that they are not entitled to any compensation in the nature of salvage.

An intervening libel has been filed on behalf of the owners of the tow-boat F. M. Streck, which was employed by the city authorities to tow the burning vessel to the opposite side of the river. The interveners, also, deny that the services alleged in the libel were performed by the libelants.

An intervening libel has also been filed on behalf of Bell, a stevedore, who discharged the cargo brought by the bark to this port, and also put on board 550 bales of the cargo with which she was loaded at the time she took fire, on the 9th of December; for it appears that the vessel was twice on fire during the same month. The intervener alleges that he assisted in putting out the first fire which occurred on the bark, and in discharging the cargo. He also avers, that subsequently to the first fire, and previous to that of the 26th December, he stowed on board the bark 1,245 bales of cotton. For these services, rendered at different times, his accounts, amounting in the aggregate to the sum of \$924.89, were approved by the master. He also contests the right of the libelants to claim salvage.

An intervening libel has also been filed on behalf of David

Proceeds of Bark Pandora.

Maxwell & Co., for supplies furnished the bark from the 2d of November until the 20th of December, inclusive.

This claim for supplies, as well as that of the stevedore, for loading and discharging the bark previous to the fire of the 26th of December, must be asserted against any remnant in the registry after the other claims have been satisfied.

The claim of the libelants for a salvage compensation is resisted upon the ground that Emerson, and those employed under his orders, acted merely as watchmen, to prevent whatever might be saved from the bark from being stolen after it was landed. But evidence does not justify the court in regarding them in the light of watchmen merely. Without detailing at length the facts contained in the depositions, I will extract such only as may be necessary to show the nature of their services and the circumstances under which they were rendered.

James Titus states, that when he saw the bark, at 9 or 10 o'clock on the morning of the 26th of December, she was a mile or mile and a half below Algiers. She was burning then, abaft the foremast. She was at anchor, about forty feet from the shore. He does not know the fact, but she might have been aground. The master of the bark was pointed out to witness, standing on the forecastle; and there was a city fireman on the bowsprit, cutting away the headstays, which, after being cut away, swung in and caught fire. This was all that was done till the master came ashore. There were several boats around picking up and carrying away what they could. When the master came ashore the libellant Emerson spoke to him about giving up the vessel. The master replied that he did not know how that would do, but that he could not save anything more. After speaking to several of his friends here and there, the master returned to Emerson and told him to save what he could, and to look to the things saved for his pay; also to keep a look out on the things ashore, and see that no one stole them. These were things that had drifted from the ship, such as spars, rigging, tackling, &c., which had burned away and floated ashore, and were lying along the bank. The master of the bark then said he was sick, and left and went to the city. The person pointed out to the witness as the mate, went away with the

Proceeds of Bark Pandora.

master. Emerson and the witness then went to Algiers to get tools for the purpose of scuttling the bark. They commenced by cutting a hole in her, forward, but persons ashore calling out that the foremast was falling, they abandoned the forward, and went to the larboard quarter, where they cut a hole; but the vessel burned so fast that the hole rose above the water, the vessel lightening all the while. There was great danger attending their work, their clothes catching fire several times. There were four of them at work in the boat, alongside the bark, at the same time. The port warden, Mr. Clark, now hailed Emerson and witness to come ashore, as they could do nothing more. They then went ashore, and Emerson determined to let the fire burn low enough to permit him to put men there to put it out with buckets. It was nearly dark. Emerson employed some men to watch the things ashore and also the ship, to prevent theft. This was all that was done on that day.

The next day, quite early in the morning, the witness went down again and found Emerson there with men employed in wetting the sides of the bark to stop her burning and sinking. The planks and timbers along the edge of the vessel were burning, and they put water on to prevent her from sinking. She was burnt nearly to the copper, and was about a foot or eighteen inches only above the water. The witness was again there Tuesday morning. The vessel was still burning, and Emerson and his men were working with their buckets and watching the goods on shore. This they continued to do until the purchasers of the bark came forward and took possession, they employing the same men to work on until they could get a tow-boat to bring her across to this side.

The witness was present at the sale of the bark and the rigging, &c. There were two separate sales. The materials saved by the F. M. Streck were sold before the hull and separately. The witness was paid ten dollars for his services. This testimony is corroborated by that of Bishop, Crane, Foster and Robinson, and it is sufficient to show that the services rendered by the libelants were salvage services for which a liberal compensation should be allowed. They were three days at work,

Proceeds of Bark Pandora.

and though perhaps there was no great danger incurred, their exertions were incessant and finally successful.

The claim of the F. M. Streck must be asserted against the proceeds of that portion of the rigging which was actually saved by her. So far as it relates to her services rendered in towing the bark across the river, she would be entitled to a reasonable compensation as towage. But I cannot regard her in the light of a salvor. She did not actually save the hull of the bark and her cargo; for she abandoned them before they were finally rescued by the salvors. As no specific claim has been asserted against the proceeds of that portion of the rigging brought away by her from the burning vessel, no allowance can be made in this decree. On the proceeds of the bark and cargo I am of opinion she has no lien except for towage.

As the exertions of the libelants may be considered as in all respects meritorious, they should, as I have already intimated, be liberally rewarded. The value of the property saved is small, and it is certain that it was entirely through their persevering efforts that it was finally rescued from the flames. The bark and her cargo were to all intents and purposes abandoned by the master to the salvors (though such an abandonment may not be what is properly and technically termed a *derelict* in the maritime law), and I do not think that under all the circumstances a moiety would be an extravagant compensation.

The proceeds of the bark and cargo amount to the sum of \$1,525. From this sum the costs and expenses of court must be first deducted. Of the balance, one moiety will be paid to the salvors, Emerson and his associates; a reasonable compensation for towage (the amount to be shown by evidence) will be allowed the F. M. Streck; the claim for supplies will next be satisfied, and the residue, if any, will be paid to the stevedore.

The case will now be referred to the commissioner in admiralty, who will distribute the proceeds in accordance with this decree.

The Barge Jenny Lind.

JOSEPH WILLIAMS *et al.* v. THE BARGE JENNY LIND.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. MCCALED, JUDGE.

1. Since the decision of the Supreme Court of the United States, in the case of *The Genesee Chief v. Fitzhugh et al.*, 12 Howard, the admiralty jurisdiction has been considered as fully established on the Mississippi river, and all other rivers as far as they are navigable from the ocean, for vessels of ten or more tons burden.
2. The establishment of such a jurisdiction, necessarily carries with it all its incidents. Salvage services are as much the subject of admiralty jurisdiction, as damages arising from collisions or other maritime torts.
3. The stipulations of a written contract will be recognized no further in a court of admiralty charged with a case of salvage, than they accord with the opinion of the court in the exercise of a sound discretion.
4. This court as a court of admiralty, cannot be called upon to enforce a specific performance of such a contract, though such a contract may and often does form a fair and equitable criterion in fixing the *quantum* of salvage compensation.

J. W. Price, proctor for libelants.

Duncan & McConnell, proctors for respondent.

MCCALED, J.—This is a claim for salvage compensation for services rendered on the Mississippi river. It appears that on the 25th of January last, the steamboat Hungarian left the port of Cincinnati bound for the port of New Orleans, having in tow the barge Jenny Lind, laden with a cargo of flour, pork and tallow. On the night of the 6th of February, both the steamboat and barge ran hard aground on Princeton bar, in the Mississippi river. The steamboat remained in that position until the 9th of February, when she got off through the assistance of the steamboat Moses Greenwood, and on the day after, proceeded on her voyage to this port. It does not appear that before leaving, any active exertions were made by her captain to get the barge afloat. The witness Robertson, who was examined under a commission, states that Captain Collier (commanding the Hungarian)

The Barge Jenny Lind.

took a yawl and went down and examined the condition of the barge and reported that he could do nothing with her.

The witness Mass, who was supercargo on the barge, testifies that Captain Collier endeavored to make some arrangements with the *Moses Greenwood* to relieve the barge. The captain of the *Greenwood* consented to endeavor to do so, but asked for a delay of two days, to enable him to go up to the mouth of the Arkansas river, and put out his cargo and return. It was the opinion of those persons with whom the witness conversed upon the subject, that the barge would break in two in less than twelve hours. He conversed with the pilots of the *Greenwood*, and with the captains of both the *Hungarian* and *Greenwood*. The *Greenwood* felt her way out on the bar towards the barge, and the captain concluded that by means of a flat boat between her and the barge, they might pass the cargo out of the latter on to the *Greenwood*. He would, however, agree to do nothing until he had been up to the mouth of the Arkansas. He thought he might return on the Saturday following, but would make no agreement to be back until Sunday. He refused to leave any of his hands on the barge during his absence. He said he would charge a dollar per barrel for the flour, and fifty cents a hundred for the tallow and pork, on all he might take off and bring to New Orleans. Finding that the *Greenwood* would do nothing in time, and that some immediate action was necessary to relieve the barge, the captain of the *Hungarian* proposed to leave the witness in charge of the barge and to proceed with the steamboat on her voyage. To this the witness objected, as he was unwilling to have the whole responsibility on his hands. After a variety of propositions were discussed by the captain and the witness, the latter suggested that Mr. Williams, who is the libellant in this suit, and who was employed as mate on the *Hungarian*, should take charge of the barge and her cargo, and endeavor to get her off, as he had great confidence in his skill and ability. The captain declared he did not know what to do, and thought if he left Mr. Williams behind, he would be blamed if there was any loss. The witness then went to the libellant and proposed to him that he should remain behind and take charge of the barge. This the libellant refused to do, saying that he did not

The Barge Jenny Lind.

want anything to do with it; for if he remained behind, he would only be cursed for his pains. The witness insisted, and after a good deal of conversation, the libellant said it was a very bad job, but that he did not see what else could be done. He remained and took charge of the barge upon the terms and conditions expressed in the following agreement, which was signed at the time.

"To all whom it may concern. Know ye that I, Daniel Collier, captain of the steamer Hungarian, having had the barge Jenny Lind loaded with flour, pork and tallow, and bound for New Orleans, in tow, and grounded said barge on Princeton bar in the Mississippi river, where she now lies in a perilous situation, do hereby abandon said barge Jenny Lind and cargo, to Joseph Williams, and agree that he shall have fifty per cent. upon all property saved. As witness my hand, dated at Princeton, Mississippi, this 10th day of February, 1853.

(Signed) "D. COLLIER,

"*Captain of the Steamer Hungarian*, for all concerned."

"We, the undersigned, hands employed on the above-named barge Jenny Lind, do also, so far as we are concerned or have any authority, abandon said barge to Joseph Williams, as above stated, believing it to be the best thing that Capt. D. Collier could do for all parties concerned.

"As witness our hands the day and date above written.

(Signed) "W. H. MASS,

"HUGH M. GEORGE."

The testimony of Mass is substantially corroborated by that of Robertson, who had been the second clerk of the Hungarian, but who also left her with the libellant, to aid in getting the barge afloat. The other persons who participated in the salvage service, were Thomas Sheehy, Daniel Burns, William and John Murphy, George Light and Joseph McKiver. They have already received a compensation for their services in the nature of wages, but are now claiming a further allowance in the nature of salvage, and allege in their intervening libels, that when they

The Barge Jenny Lind.

executed their receipts in full for wages, they did so in ignorance of their rights.

Before the libellant Williams and those who aided in the salvage service left the Hungarian, they received their wages then due, and were regularly discharged from the obligations of their contract by the captain. They left with his full consent, and were perfectly at liberty to embark in the enterprise. The salvors have been examined, to prove the character of the services they rendered, and the length of time they were engaged in getting the barge afloat. I have, however, attached very little importance to their testimony, not because there is any reason to believe that they have been guilty of exaggeration in their statements of the value of their services, but because I find the disinterested testimony of Mass and of Robertson, to be sufficiently clear and satisfactory to enable me to arrive at a satisfactory conclusion. Both of these witnesses participated in the efforts which were finally successful in delivering the barge, but neither of them appears before the court as a salvor. The former, as we have already seen, was the supercargo of the barge, and seems to have exhibited throughout a becoming solicitude for the interests of the owners of the cargo. The latter was employed by the libellant at five dollars per day, and although not perhaps entirely disinterested, seems to have made his statement with great candor and with every appearance of truth. He is, moreover, in all material facts, sustained by the testimony of Mass.

This evidence fully establishes the meritorious character of the services rendered. The barge was regarded by Captain Collier of the Hungarian, to be in a perilous condition. Apprehensions were entertained that she would break in two. There was about ten feet of water at her bows as she lay on the bar, about three and a half or four feet at her stern, and about two feet a little abaft midships. She had already leaked a little and she was very much strained. The river was falling when the salvors commenced operations, though it rose about the time they got the barge afloat. The weather was very disagreeable as it was raining nearly all the time, and the men were greatly exposed. The libellant Williams was compelled to employ an additional force of twelve negroes from the neighboring plantation of Major

The Barge Jenny Lind.

Smith, and for each of these he agreed to give the sum of \$5 per day. He lost two flat-boats while they were laden with a portion of the cargo of the barge. He paid \$75 for one, and \$153 dollars for the other. He also paid \$25 for the use of another. The salvors were laboriously engaged for three days in getting the barge afloat, and a great portion of this time they worked in the night, as the river was falling. When they finally succeeded in getting her off, a contract was made with the steamboat New Orleans to tow her to this port, and for this service \$800 was agreed to be paid.

It is unnecessary to notice more particularly the evidence upon which the claim for salvage compensation is founded. The proctor for the claimants denies that any such claim can be legally asserted. But I cannot concur in the position he has assumed. Since the decision of the Supreme Court of the United States, in the case of *The Genesee Chief v. Fitzhugh*, the admiralty jurisdiction has been clearly established upon the whole length and breadth of the Mississippi, and all other public rivers, as far as they are navigable from the ocean, for vessels of ten or more tons burden. The establishment of such a jurisdiction necessarily carries with it all its incidents. Salvage services are as much the subject of admiralty jurisdiction, as damages arising from a collision or other maritime tort.

But while I am clear in the opinion, that I have no power to refuse to exercise a jurisdiction, which has been so fully and unequivocally conferred, and while I am satisfied from the evidence that the services performed by the salvors in this case, are of a highly meritorious character, I am yet constrained to differ very materially from the view taken by the captain of the Hungarian, in his estimate of the value of those services. Such contracts as the one which he thought proper to execute, in favor of the libelant (Williams), will be recognized no further in a court of admiralty charged with a case of salvage, than they accord with its own equitable discretion in filing the *quantum* of compensation. It would be absurd to call upon this court to enforce the specific performance of such contracts. They may, and often do, form a fair and equitable criterion in awarding compensation for salvage services, if those services

The Barge *Jenny Lind*.

have been rendered under circumstances which show that the parties have voluntarily, and without any controlling necessity, on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services *quantum meruerunt*; in either case it does not alter the nature of the service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage contract, and a salvage compensation. But contracts made for salvage services, are not held obligatory by a court of admiralty, upon the persons whose property is saved, unless the court can clearly see, that no advantage is taken of the situation of the parties, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. And it has been remarked with equal justice and elegance, that no system of jurisprudence, purporting to be founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others, to force upon them a contract, unjust, oppressive and exorbitant: that he might turn the price of safety to the price of ruin: that he might turn an act, demanded by christian and public duty, into a traffic of profit which would outrage human feelings, and disgrace human justice. *The Schooner Emulous*, 1 Sumner, 210.

The terms of the contract in this case are entirely too exorbitant and do great injustice to the innocent owners of the barge and her cargo. If the services of the salvors had been rendered upon the ocean or on a dangerous coast, amid the perils arising from exposure to storms, I would not feel myself called upon to fix the *quantum* of compensation at a higher rate than was allowed by this contract. The actual labor performed was doubtless great, but it was entirely unattended with any danger to life, that most important ingredient in a salvage service. I have no disposition certainly to pass censure upon the conduct of the captain of the Hungarian; but as cases of this nature may frequently arise from the growing commerce of the Mississippi, I deem it my duty to lay down such rules for the future guidance

 Bark Geo. Nicholaus.

of the court, as will teach the masters of steamboats that they cannot with impunity trifle with the rights of owners who confide property to their charge. In no sense of the maritime law was this a case of derelict, however the term "abandon" may have been used by Capt. Collier in his contract with the libelant. Parties cannot, by the terms they choose to employ, change the well established principles of law. This question of what constitutes a *derelict* in the sense of the maritime law, has already been examined by this court in various cases, and very recently in the case of *The T. P. Leathers, ante*, p. 421. The proceeds of the cargo in this case amount to \$21,593.55, and the agreed value of the bark \$3,600, making in the aggregate the sum of \$25,193.55. Instead of the moiety allowed by the contract I am of opinion that one-sixth will be both a fair and liberal allowance. Of this amount I shall order the sum of \$12 to be paid to each of the intervening libelants in addition to the sum they have already received as wages. The entire balance I shall order to be paid to the libelant Williams, in view not only of the services he has rendered, and the responsibility he assumed, but also of the expenses he incurred in saving the property.

The question of costs is reserved for future consideration, and in the meantime all parties having claims for costs under the provisions of the late act of Congress, are ordered to present those claims to be filed with the clerk.

A. C. STURTEVANT *et al.* v. THE BARK GEORGE NICHOLAUS.

District Court of the United States. Eastern District of Louisiana.
In Admiralty.

HON. THEO. H. MCALEB, JUDGE.

1. When a vessel at sea meets with another, on board of which the greater part of the crew are dead, and the rest rendered entirely helpless by disease, it is the duty of the master of the first vessel to interrupt his voyage to take the neces-

450 DISTRICT COURT OF THE UNITED STATES.

Bark Geo. Nicholaus.

- sary steps to preserve the lives of the sick, imposed by natural law and the commands of christianity.
2. Such a stoppage or interruption is not such a deviation as would discharge any insurance or render the master civilly or criminally responsible for any subsequent disaster to his vessel.
 3. There is no obligation upon the master to lie by, or delay the progress of the voyage for the purpose of preserving property. This would discharge the underwriters from future responsibility.
 4. The maritime law and commercial usages do not prohibit the master from deviating under such circumstances, in the exercise of a sound discretion to save property that is imperilled.
 5. When a part of the crew of a vessel at sea are dead, and all the rest physically and mentally incapable of providing for their own safety, this is not what is known as *derelict*, but *quasi derelict* in the admiralty.
 6. In a case like the present, one-third clear of all expenses of the property saved was decreed a liberal allowance.
 7. The assignment of a claim for salvage divests the lien originally existing in favor of the salvor, and confers no right upon the assignee to claim reimbursement in a court of admiralty.
 8. The lien for towage is also divested by an assignment of the claim.

Durant & Hornor, proctors for libelants.

Benjamin, Micou & Finney, Moise & Randolph and *M. M. Cohen*, for interveners.

MCCALEB, J.—The libelants in this case claim a salvage compensation for services rendered to the bark George Nicholaus, of Hamburg. They allege that they are the master and crew of the bark Sarah Bridge, of Portland, Maine: and that on the 8th of October last, while on a voyage from Bordeaux to New Orleans, and when they were about forty miles south by east from the South West Pass, they descried a bark under very short sail, and apparently deserted or unmanageable. Her sails were flapping in the wind, and she steered as if no one was at the helm. Believing her to be in distress, they hove to on the Sarah Bridge until the bark came down near them, and they discovered that she was the George Nicholaus, of Hamburg. There was a man on the forecastle, who hailed and begged them to come on board, saying that all on board the George Nicholaus, except himself, were dead. They immediately hove to the Sarah Bridge, and sent the mate, Patrick Cass, and three men,

Bark Geo. Nicholas.

to ascertain the condition of things on the bark. They found four persons alive, but three of them were insensible, and no communication could be held with them, and from the man who had hailed them, they learned that the George Nicholas had sailed from Navy Bay, on or about the 9th of September, 1853, and was bound to Cardenas, in the Island of Cuba: that shortly after she went out of port all hands fell sick with Chagres fever, and that the captain died when she was eleven days out, and eight of the crew had also died before the time when she was descried by the libelants. These facts were obtained from the man who hailed the Sarah Bridge, and who was found in an extremely feeble condition, and seemed to be somewhat out of his mind, in consequence of sickness and exposure. The log was not written up, and the chronometer was out of order. The bark was in a desperate condition, and would soon have been lost by the action of the winds and waves. The libelants took possession of her, and placed on board Patrick Cass, the mate, and a sufficient number of the crew of the Sarah Bridge to manage and bring her into this port, where she arrived on the 9th of October last.

The service rendered by the salvors was certainly meritorious, but unattended by extraordinary exertion. There was danger incurred in consequence of the existence of a malignant disease on board the George Nicholas. The extent of that danger can only be estimated by the mortality among those on the ship from the time she left Navy Bay. It is true that no evidence has been adduced to prove that the disease was of a contagious character; but from the facts before it, the court is not at liberty to say that no danger was incurred by the salvors who went into the hold of a vessel evidently infected with a disease, which, within a very few days, had proved fatal to almost every human being on board. The promptitude with which assistance was rendered, also deserves to be favorably noticed. It was a case which called for those very offices of humanity which were performed with alacrity and zeal by the salvors. The saving of life is an ingredient in a salvage service which is always highly estimated by the courts. The mere preservation of life, it is true, this court has no power of re-

munerating; it must be left to the bounty of the individuals; but if it can be connected with the preservation of property, whether by accident or not, then the court can take notice of it, and it is always willing to join that to the *animus* displayed in the first instance. *The Aid*, 1 Haggard, 84. It was, indeed, the duty of the master of the *Sarah Bridge* to interrupt his voyage for the purpose of taking on board the survivors of the crew of the *George Nicholas*, in their suffering state, for the safety of their lives. It was a duty imposed upon him by the first principles of natural law—the duty to succor the distressed, and it is enforced by the more positive and imperative commands of christianity. The stopping for this purpose could not be deemed a deviation from the voyage, so as to discharge any insurance, or to render the master criminally or civilly liable for any subsequent disasters to his vessel, occasioned thereby. But, beyond this, there was no supervening or imperative duty. The master was under no obligation to lie by in order to save property, or to delay the proper progress of the voyage. Any stoppage for such purpose would, of itself, amount to a deviation; and any going out of his course for such a purpose, being wholly unauthorized, would discharge the underwriters from all future responsibility. But the maritime law, looking to the general benefit of commerce, upon a large and comprehensive policy, does not prohibit the master, under such circumstances, from deviating to save property in distress, if he deems it fit in a sound exercise of his discretion. As between himself and his owners, the usage of the commercial world has clothed him with this authority; and in return for such extraordinary hazards, it has enabled the owners to partake liberally in the salvage awarded for the meritorious service, when it is successful. *The Boston and cargo*, 1 Sumner, 336.

This is certainly not what is known in the admiralty law, as a case of *derelict*. It is rather what has been denominated by the courts, a *quasi* *derelict*. The vessel was not abandoned, but the evidence shows that those on board of her were both physically and mentally incapable of doing anything for their own personal safety. She was certainly in a situation of extreme danger and distress. She was entirely at the mercy of the winds and

waves, and a few hours of stormy weather, would, we may reasonably conclude, have sealed her fate. I have already stated that the service rendered by the salvors, was not attended by extraordinary exertion. But, to use the language of Mr. Justice STORY, in the case of *The Boston and cargo*, 1 Sumner, 38, "I should be sorry to lay down any doctrine, by which it should be supposed, that if, in a meritorious case of salvage, derelict or *quasi* derelict, there was subsequently no great hazard or labor of an exhausting nature, the salvage was therefore subject to great diminution. I should fear, that such a doctrine would be found as mischievous in practice, as it would be unjust in principle." Upon questions of this nature, a large discretion must of necessity, belong to the public tribunals. It is of great importance, as far as it can be done, to avail ourselves of fixed rules and habits in the performance of a delicate duty, and not to deviate from them, except upon urgent occasions. The rule of salvage in cases of derelict usually is (as has been often said), to give one half, and it has rarely been below two-fifths, of the property saved.

Regarding this as a case of *quasi* derelict, I am disposed to award a liberal compensation to the salvors, and believe that the proportion of *one-third*, will be a fair allowance. A case similar to the present was not long since decided by Dr. LUSHINGTON, sitting in the high Court of Admiralty in England. It was a suit instituted by the master, second mate and one seaman, belonging to the American bark *Tartar*, for salvage. The *Tartar*, whilst on her voyage from Calcutta to Boston, in latitude 13° north, and longitude 46° west, fell in with a brig with a signal of distress, which proved to be the *Active*, of the burden of 170 tons, laden with sugar, from Pernambuco to Hamburg. The master of the *Tartar*, on boarding the brig, found that shortly after she had left Pernambuco, the yellow fever had broken out on board, and had already destroyed seven hands of a crew consisting originally of eleven, including the master: that the master was then actually dying: that of three remaining, one had lost the use of his right arm, and that none of them were acquainted with navigation. In these circumstances the master of the *Tartar* expressed his wish and readiness to render them any assistance, stating at the same time that he could not compel any of his

crew to come on board a ship situated as the *Active* was. On his return to the *Tartar*, the second mate and one seaman immediately volunteered, and having been put on board, they succeeded in bringing the ship and cargo safely to Falmouth. The master died soon after they came on board. The value of the ship, freight and cargo, was agreed at £4,300. No opposition was offered to the merit of the salvors, and Dr. LUSHINGTON, after stating the circumstances and commenting briefly on the high nature of the services, gave the sum of £1,500, and apportioned £500 to the mate, £400 to the seaman, and £600 to the master of the *Tartar*, to meet any claims of the owners, for whom no appearance had been given.

Here it will be seen that something more than one-third was awarded, and although the value of the property saved is greater than in the case now before the court, it will also be seen that the circumstances under which the services were rendered were such as to enhance the compensation beyond what I feel it my duty to allow in the present instance. The value of the property saved in this case, as appears by the account sales rendered by the marshal, is \$4,500. Of this sum I award \$1,500 to the salvors free of all costs and charges.

Before I proceed to apportion this amount to the salvors, it becomes necessary to decide certain questions of law which were pressed upon the attention of the court in the arguments of the proctors at the bar.

It appears by an assignment on the record, that the first mate of the *Sarah Bridge*, Patrick Cass, has transferred his claim for salvage to Appleton Oaksmith of New York, and the consideration of the assignment is stated to be the sum of \$150. It is contended by the proctor of a portion of the salvors, that Patrick Cass, the mate of the *Sarah Bridge*, is no longer before the court, his lien for salvage having been extinguished by payment; and that the transferee of his claim has no right, in virtue of the assignment, to demand from a court of admiralty reimbursement of the sum advanced.

This proposition in law involves no intrinsic difficulty. An assignment of a claim for salvage, divests the lien which originally existed in favor of the salvor, and consequently confers no

right in the assignee to claim a reimbursement in a court of admiralty. The reasoning of Judge CONKLING of the northern district of New York in the case of *Patchin v. The Steamboat Patchin*, reported in the Law Reporter, p. 21, though a case of seaman's wages, is equally applicable to the claim of a salvor. "It was correctly urged by the counsel for the petitioner," says the court, "that in cases arising *ex contractu*, the admiralty jurisdiction depends on the nature of the contract; and it is true, also, that this jurisdiction is not always confined to the immediate parties to the contract. Thus a bottomry bond is assignable and may be enforced in the name of the assignee. But bottomry is an express hypothecation, and binds the ship to the lender and his assigns. So also is a bill of lading assignable, or rather negotiable, and the holder may in this country maintain an action in the admiralty upon it in his own name. But the quality of negotiability is given to this instrument by law for the benefit of trade, and its transfer, moreover, carries with it the title of the goods shipped and of course the right to maintain a suit upon it for their value in case of their loss. This right of the mariner to proceed against the ship *in specie*, is conferred upon him for his own exclusive benefit. It arises by implication, and exists independently of possession. Its object is the more certainly to secure to him the hardly earned fruits of his perilous and useful services. When, therefore, his wages are paid, no matter by whom, the design of the privilege is answered; and to say the least, it is very questionable whether he would be benefited by the capacity to transfer it to another; for if this power would sometimes enable him to obtain immediate payment, it would also expose him to imposition through his credulity and proverbial improvidence." * * * "Implied liens are admitted with unsparing caution by the common law. Being allowed for the benefit of trade, they are limited to that object, and are held also to be strictly personal. The right of lien depends on the actual possession by the person claiming it, of the goods to which it is attached; and if he parts with the possession, the lien is irretrievably lost. In the absence of any authority to the contrary, I am of opinion that the mariner's lien ought in like manner to be considered as restricted to its design, and

as merely personal. The petitioner cannot justly complain of being denied the privilege of maintaining a suit *in rem* in the admiralty; the ordinary forms of remedy in favor of an assignee of a chose in action, are open to him in common with all others."

While I consider the reasoning of the court in the case here cited in all respects applicable to the lien in favor of a salvor, and while I am clearly of opinion that the intervening libel of Mr. Oaksmith, the assignee of the claim of Patrick Cass, must be dismissed for want of jurisdiction in this court to entertain it, I am equally clear in the opinion that the object which the proctor had in view in urging his objection to the recognition of the claim, cannot be accomplished in this case. The objection has been presented on behalf of the master of the Sarah Bridge, and was doubtless pressed upon the attention of the court with the hope that, if successful, it would have the effect of causing the share of the mate, who appears from the evidence to have been the principal salvor, to enure to the benefit of the master and the other co-salvors. Such a result would by no means follow, and certainly under the circumstances of this case, would be justified upon no principle of law or equity. There has been no forfeiture of the claim of the mate in consequence of any fraud, embezzlement or other malpractice, which calls for his punishment at the hands of the court; and while his co-salvors are entitled to a full reward for their respective services, they have no right to demand the amount of remuneration which is justly due for his skill, trouble and exertions.

It is also proper for me to remark that the assignment in this case has not been regarded by the court as a criterion by which the share of the master was to be determined in the mode of distribution. It will be seen that he is entitled to more than the amount set forth as the consideration of the assignment. This overplus he must be permitted to receive upon the final distribution, while the balance of his share will enure to the benefit of the owners of the George Nicholas, or more properly to the holders of the bottomry bond. It is to them the assignee, Mr. Oaksmith, must look for reimbursement of the amount advanced. At any rate this tribunal can give him no relief.

- The intervening libels filed on behalf of the survivors of the

The Bark Geo. Nicholaus.

crew of the George Nicholaus, must also be dismissed. It is unnecessary to decide whether or not their contract with their own vessel was dissolved by the death of the master and the balance of the crew; for admitting that it was, there is no evidence upon the record to show that they rendered any service which would justify this court in awarding them a compensation in the nature of salvage. All the evidence adduced shows, on the contrary, that they were physically incapable of rendering any assistance to the salvors. They were utterly unable to do anything either for their own personal safety or for the safety of the vessel.

The intervening libel of Mr. Oaksmith for towage, must also be dismissed for the reasons already given for refusing to entertain jurisdiction of his claim as assignee of Patrick Cass. It is founded upon an assignment which destroys the original lien, and this court has no power to grant relief.

In order to render the mode of distribution clearly intelligible, I shall present the share of the mate as it would have appeared in the absence of any assignment. He will be permitted to receive, however, only the amount over and above the \$150, the consideration of the assignment. From the very liberal allowance awarded to the master of the Sarah Bridge must be deducted the sum of \$20, for pilotage due to the intervening libellant, John Perrin. The costs of court will be deducted from that portion of the proceeds of the property which will accrue to the owners of the George Nicholaus, or more properly to the holders of the bottomry bond; for the sum which may remain after the payment of all necessary costs and expenses, will necessarily be absorbed by the claim of the holder of the said bond.

I have stated that I should award one-third of the value of the property to the salvors. That value is ascertained to be \$4,500. The third of that sum will be \$1,500. Of this amount I shall award the usual proportion of one-third to the owners of the Sarah Bridge, \$500, leaving the sum of \$1,000 to be distributed among the salvors, viz: the master, mate and six seamen, \$1,000. This amount I shall divide into twenty shares of \$50 each, to be apportioned as follows: To the master I shall award nine shares amounting to \$450, from which sum will be

458 DISTRICT COURT OF THE UNITED STATES.

Steamboats S. W. Downs and Storm.

deducted pilotage, \$20; to the mate, four shares, \$200 (\$50 only to be actually paid); to the seaman, McClelland, who remained constantly on board the George Nicholas, I shall award two shares, \$100; and to each of the other seamen, five in number, I shall award one share, as follows: to Wm. H. Smith, \$50; to David Graves, \$50; to John Hall, \$50; to Patrick Powers, \$50; to John De Pape, \$50.

RECAPITULATION.

Aggregate amount of salvage	\$1,500
Owner's proportion, one-third	\$500
Master's " including pilotage,	450
Mate's "	200
McClelland's "	100
Smith's "	50
Graves's "	50
Hall's "	50
Powers's "	50
De Pape's "	50
	<hr/>
	\$1,500

HIRAM E. STEVENS and owners of the STEAMBOAT ELIZA, Libellants v. THE STEAMBOATS S. W. DOWNS and STORM and cargo of the STORM.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. MCALEB, JUDGE.

1. A steamboat for services performed in towing other steamboats from positions where they were moored at the wharf, and thus preventing them from coming in contact with a steamboat on fire descending the river, is entitled to a compensation for towage, and not to a compensation in the nature of salvage.
2. A party who in view of the danger with which his boat is threatened by the approach of a steamboat on fire, calls for the assistance of another steamboat to remove his property from its perilous situation, will not be allowed to plead exemption from liability to pay for the services demanded, upon the ground that his property would have been safe, if left in its original position.

Steamboats S. W. Downs and Storms.

3. If a steamboat, while extricating another steamboat from her perilous situation, during the excitement and confusion incident to a threatened conflagration, should unavoidably injure the latter, she will not be held responsible for the injury; and a reconventional demand in the nature of a cross libel, claiming compensation for such an injury, will be dismissed.

MCCALEB, J.—The libelants claim a salvage compensation for having taken the steamboats S. W. Downs and Storm from their landing place, at the wharf, and thus saving them from being burnt, on the 15th of February, 1853. It seems that between the hours of 10 and 11 o'clock on that day the steamboat John Swasey took fire while descending the river nearly opposite Lafayette, and drifted down the current. While enveloped in flames she passed very near the sterns of the many steamboats then lying moored at the wharf near the foot of Canal and Custom-house streets. Great consternation and alarm was created among those having charge of the boats, and the utmost anxiety was manifested to prevent them from coming in contact with the burning boat. The steamboat Eliza was about to leave port on her voyage up the river, and had already raised steam. She first towed out the steamboat Eclipse, and afterwards performed the same service for the Downs and the Storm, at the request of those having charge of those boats at the time.

While I do not feel myself called upon to decide that this is not a case of marine salvage, I have no hesitation in saying that it is a case where the services performed should entitle the libelants to little more than would be allowed upon a *quantum meruit*, for work and labor performed. A great deal of testimony has been taken by the respondents, to show that the boats which were towed out by the Eliza were not in danger, and would not have been burnt if they had been left in their original position at the wharf; and yet it has been clearly proven, that the bells of these boats were rung and the assistance of the Eliza expressly solicited. Much of this evidence, therefore, directly contradicts the acts and declarations of those who had charge of the boats while the John Swasey was on fire. That those who asked for assistance at the time, believed they needed it, can hardly be a matter of doubt. And while I am satisfied that the Eliza should be compensated for the trouble and delay to which she was subjected,

I can see no ground for such an extravagant allowance, as seems to have been in the contemplation of the proctor who argued the cause in behalf of the libelants. I think the Eliza is entitled to a liberal compensation in the nature of towage. It has been shown that substantially the same services were rendered by another boat for a compensation upon this principle. I would certainly offer to steamboats sufficient inducement to render assistance under such circumstances; but I do not deem it either safe or proper to hold out expectations of an extravagant remuneration for services which should be dictated by generosity, and which are usually prompted by the spirit of comity prevailing among the commanders of steamboats. The services were performed in daylight, and I am satisfied that while the Eliza perhaps incurred some risk, she was subjected to little or no actual danger. For the services she rendered to the Downs, she is, I think, entitled to receive \$100, and for her services to the Storm, she should receive \$75, and for these sums I shall order judgment to be given in favor of the libelants, with costs.

The claim in the nature of a reconventional demand asserted by way of cross libel by the respondents, must be rejected. They were certainly benefited by the assistance so seasonably rendered by the Eliza, and it is now entirely too late to speculate upon the chances of escape from the peril to which they certainly believed their property was exposed, when they demanded that aid from the Eliza, which seems to have been promptly and cheerfully given. The injuries complained of, were, in my judgment, the result of unavoidable accident, attributable, doubtless, in a great measure, to the hasty and imperfect manner in which, amid the confusion of the moment, the boats were fastened together; and for which those on board of both boats were responsible. I am satisfied from the testimony of the pilot of the Eliza, that it was impossible during the violence of the gale which was prevailing at the time, to land the boat in tow. The order to cast her loose, seems to have been dictated by overruling necessity, and it does not appear that any objection was made to it at the time, by the officers of the Downs. If, under all the circumstances of the case, the libelants were not successful in towing the boats from their position at the wharf to a place of safety

Steamboat Southern Belle.

without causing some injury, it should not be imputed to them as a fault; and the respondents should regard the injury complained of, as a part of the price of the timely rescue of their property from the danger of far greater injury to which it was exposed. Upon a full and fair consideration of all the facts and circumstances of this case, I cannot adopt the conclusion to which the argument of the proctor for the respondents would lead; that the Eliza after having performed the service alluded to at the express solicitation of those on board the Downs and the Storm, should now, not only be denied a reasonable compensation for those services, but condemned to pay the damage sustained from causes beyond her control.

The reconventional demand will therefore be dismissed, and judgment entered in favor of the libelants for the sums already mentioned, with costs in the proportion of four-sevenths against the S.W. Downs, and three-sevenths against the Storm and cargo, or against the claimants and sureties on the bonds executed and returned into court on the release of said boats respectively. The costs to be taxed by the clerk.

WM. B. CULBERTSON *v.* THE STEAMBOAT SOUTHERN BELLE.

District Court of the United States. Eastern District of Louisiana.
In Admiralty.

HON. THEO. H. MCALEB, JUDGE.

1. The corporations of cities and towns on the Mississippi river, when authorized by the legislatures of the different states, within which those cities and towns are situated, have the right to pass rules and regulations relative to their landings; and it is the duty of this court to respect them.
2. Testimony introduced to show that the ordinances of the town of Grand Gulf, fixing the places of landing for steamboats and flat-boats, are rarely enforced by the authorities of the town, can have no influence with this court; for if the fact be so, it may serve to show a gross dereliction of duty on the part of those who have been charged with the execution of those ordinances, but can afford no ground for this court to decree that they are to be totally disregarded.

Steamboat Southern Belle.

3. Whether the libellant, in taking a position for his flat-boat at the landing, did so voluntarily or in accordance with the orders of the proper officer having a supervisory control over his actions, is not material. If he brought himself within the pale and under the protection of the local regulations, he was in his proper position; and the attempt of a steamboat to land there, must be considered as an intrusion.
4. Precaution and vigilance on the part of the officers of vessels propelled by steam, should be increased in proportion to the difficulties of navigation in particular localities, and in proportion to the dangers of collisions to which they are liable to expose the property of others.

L. Hunter, proctor for libellant.

Benjamin, Bradford & Finney, proctors for respondent.

MCCALEB, J.—This suit has been instituted to recover damages which, the libel alleges, were sustained by the libellant as owner of a flat-boat which was sunk by the steamboat Southern Belle. The flat-boat was moored at the usual and prescribed place of landing for flat-boats, and was stove by the steamer, while the latter was attempting to land at the same place. The collision occurred at Grand Gulf, Mississippi.

The rules and regulations of the selectmen of Grand Gulf, have been brought to the attention of the court, and conclusively establish the fact that the flat-boat was in its proper place. The corporations of the cities and towns on the Mississippi, when authorized by the legislatures, undoubtedly have the right to pass rules and regulations with respect to their landings; and it is the duty of this court to respect and uphold them. Testimony has been introduced on the part of the respondent, to show that the ordinances of the town of Grand Gulf, relating to the landing, are rarely if ever enforced. Such evidence can have no weight with the court, for if the fact be so, it may serve to show a gross dereliction of duty, on the part of those who have been charged with the execution of the ordinances, but can afford no ground for this court to decree that they are to be totally disregarded. Until they are repealed by the authority that enacted them, they will be presumed to be in full force, and adequate to the purpose for which they were passed. And it is a matter of no importance, whether the libellant in taking his

position at the landing, did so voluntarily or in accordance with the orders of the proper officer having the supervisory control over his actions. If he was within the pale and under the protection of the local regulations, the court will hold him justified. If he was right in the position he occupied, the attempt of the steamer to land there must be regarded as an intrusion.

It has been contended on behalf of the respondents, that the collision was the result of an unavoidable accident caused by the violence of the wind, which was blowing at the time hard on shore. I have examined the evidence most confidently relied on, in favor of the respondents, that of the pilot, who was at the wheel of the steamer at the time of the collision, and who as usual with pilots, testifies strongly in justification of his own conduct; and I am by no means satisfied, that the collision was unavoidable. This is a common plea, set up by officers of steamboats, and is seldom even plausibly sustained by evidence. In the present instance the plea is unavailing. It is not pretended that the violence of the wind was too great for the resistance of steam. If such were the fact, the boat would have been driven to the shore before the attempt to land was made. She could not have proceeded with safety on her voyage. The force of the wind undoubtedly increased the difficulties of landing; but this was only a reason for increased care and caution. This court has repeatedly held that the precaution and vigilance on the part of officers of vessels propelled by steam, should be increased in proportion to the difficulties of navigation in particular localities, and in proportion to the dangers to which they are liable to expose the property of others.

It has also been contended on behalf of the respondents, that there was no light on board of the flat-boat at the time of the collision, and that she could not, therefore, be seen from the steamer until it was too late to prevent the occurrence. On this point there is a conflict of evidence. The witnesses on behalf of the respondents, testify that they saw no light, while those who were on board the flat-boat at the time of the collision, testify most positively that a light was brought upon deck, about the time the steamboat commenced backing down from the wharf-boat. That there was a lantern exhibited on the flat-boat before the collision

Brig May Queen.

ion, I have no doubt. If it was not seen on the steamer, I can only account for the fact upon the supposition, that the greater glare of the torch light from the latter, was such as to dim if not entirely to obscure in the darkness of the night the lesser lights near the shore. But besides the existence of a light on the flat-boat, we have the evidence of the respondents' witnesses, that there was clear starlight, and some of the witnesses testify that the moon was shining at the time.

An attentive examination of the evidence and the arguments of counsel, has led my mind to the conclusion that by the observance of proper prudence and precaution on the part of the officers of the steamer, the collision could have been avoided; and that no blame can be fairly thrown upon those who had charge of the flat-boat.

I therefore pronounce for the damage sustained by the libellant to be definitely ascertained by a reference to R. M. Lusher, Esq., commissioner, upon the coming in of whose report, a final decree will be entered.

NOTE.—This decree was sustained by the Supreme Court of the United States, on appeal from the judgment of the Circuit Court, by which it was reversed.

CHARLES G. MERRIMAN v. THE BRIG MAY QUEEN.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. McCaleb, JUDGE.

1. When loss or damage happens to goods while in the possession of a common carrier, the *onus probandi* is on the carrier to exempt himself from liability; for *prima facie* the law imposes upon him the obligation of safety.
2. In cases where the carrier has given notices qualifying or limiting his liability, the burden of proof of negligence is on the shipper, not of diligence on the carrier. This is contrary to the general rule where there is no notice.
3. A common carrier may qualify his liability by a general notice to all, of any

Brig May Queen.

- reasonable requisition to be observed, as to the manner of delivery, entry of parcels, information of contents, rates of freight, and the like.
4. A common carrier cannot, by a general notice, *limit, restrict or avoid the liability* devolved on him by the common law, or the salutary grounds of public policy.
 5. A common carrier's liability may be limited or restricted by an express agreement between the parties; but he cannot do so by any act of his own. It requires the assent of the parties concerned; and this is not to be inferred or implied from a general notice to the public; nor is it to depend upon doubtful or conflicting evidence, but it should be specific and certain, leaving no room for controversy between the parties.
 6. When a bill of lading had stamped upon it "Goods to be receipted for on the leve—not responsible for rust, breakage, leakage, cooperage—weight and contents unknown," and the witness who received the goods stated "that the vessel would not be responsible for breakage," this is not such a certain and specific contract as is required to free the carrier from liability.
 7. Where an individual residing in Philadelphia was employed by a firm in Memphis, Tennessee, to construct glass cases, and from abundant caution superintended their shipment, he is in no legal or just sense the shipper, nor could he bind the owner by any contract he might enter into of so important a character as would exempt the vessel from the usual and well established responsibilities of a common carrier.
 8. But even if an express agreement has been entered into, limiting the responsibility of the carrier, such a contract could not be pleaded as an exemption from liability for any loss or damage resulting from gross negligence or misfeasance of the master or his servants.
 9. Where the officers of a vessel knew perfectly well the contents of certain boxes to be glass cases, a failure to observe every precaution necessary to insure their safe stowage and safe delivery must be held gross negligence.
 10. A protest cannot be received in our courts as evidence for the master or owner, but may be evidence against him and them.

Clarke & Bayne, proctors for libelants.

Durant & Hornor, proctors for respondent.

MCCALDER, J.—The libelant has instituted this action *in rem* to recover the damages sustained by him in consequence of the failure on the part of the officers of the brig to deliver, in the like good order in which they were received on board, four glass counter cases, which were shipped by J. E. Caldwell & Co., in the port of Philadelphia, to be delivered to Wright, Williams & Co., at this port. The shipment was made on the 9th of August last, as appears by the bill of lading. There were five cases put on board the brig, and one, only, was delivered in

Brig May Queen.

good order. The other four were found, immediately after they were taken from the vessel and placed upon the levee, to be broken in pieces and utterly worthless. The libel alleges this breakage to have been caused by the careless, negligent and improper manner in which said cases were stowed and handled by the officers and crew of the brig.

The answer of the respondents denies the allegations of negligence and carelessness, and avers that the brig was not accountable for breakage, and that the contents of the boxes in which the cases were placed were unknown: that they have delivered to the consignees, Wright, Williams & Co., the boxes of cases in the same good order and condition in which they received them on board their vessel: that the outward appearance of the cases of packages was, in all respects, as clean, fresh and new as when they were put on board the May Queen, in the port of Philadelphia. The answer further avers, that the vessel encountered heavy weather on her passage from Philadelphia to New Orleans. On the bill of lading annexed to the libel is stamped the following words: "Goods to be receipted for on the levee; not accountable for rust, breakage, leakage, cooperage; weight and contents unknown."

It is upon these words, thus stamped upon the bill of lading, that the proctor for respondents has relied to show such a limitation of responsibility on the part of the vessel as should exempt her from all responsibility for the loss sustained by the breaking of the cases in question.

The issue raised by the pleadings must be determined by the evidence, and by the law applicable to such a case as that evidence presents. And let us first examine the evidence taken under a commission, in the city of Philadelphia, where the cases were shipped.

The witness Beal states that he is a member of the firm of Beal & Forman, who were employed by J. E. Caldwell & Co. to make the five show cases in question. They were made and finished in good order, in every respect. The glass was from a quarter of an inch to three-eighths in thickness, and was of the best quality English plate glass. The cases were packed on Monday, the 8th of August, and shipped on Tuesday, the 9th.

Brig May Queen.

They were packed and shipped in five boxes, each case in a box by itself. The boxes were made by witness' firm, expressly for the cases. The witness himself assisted in packing them. He and three others were engaged in packing them, and they were employed until 3 or 4 o'clock in the afternoon. The wooden or bottom part of the cases were respectively secured fast to the boxes. The glass was then covered with paper, to prevent the straw from scratching the glass, and the German silver mounting, and the sides were then covered and filled in, the straw packed in closely, but not so tight as to cause any pressure. The straw was not packed so as to strain in any place, for the cases were screwed tight, and could not move. The tops were screwed on. The top and bottom were of inch stuff. The witness marked all the boxes himself. He believes they were marked "C. J. Merriman, care of Wright, Williams & Co., New Orleans." Also, in very large letters, on the lid of the boxes, respectively, was "glass case;" and he thinks, "with care." On the edge of the boxes was written "this side up," or "this edge up." The witness did not deliver the boxes, but his partner did. The cases were so packed that unless they had been jarred or banged in some manner, they could not have been broken.

The witness Forman corroborates all that was stated by his partner, in reference to the packing the cases and directing the boxes, and further testifies that he aided in putting the boxes on board the brig. He declared that he engaged four men who were working for the brig, to assist him in placing them in the vessel, and he saw them swung up by a tackle and lowered down between decks. They were placed between the two masts. He went down himself to see that they were handled carefully. They were handled carefully, but they were not finally stowed away when he left them; for the man who was stowing, said that he could not stow them away properly, until he got other goods to stow with them. The clerk, the captain and the mate were there, and he told them of the contents of the boxes, and that if roughly handled, they would be broken. The mate said that he would have the superintending of the taking them out, and that he would see that they were handled carefully. The witness asked particularly if there was any danger of the goods

Brig May Queen.

shifting in the vessel at sea. They (the captain and mate) replied there was not. The bill of lading was procured by Caldwell & Co., and the witness never saw it.

The evidence of this witness is in many essential particulars sustained by the testimony of Jackson, and the whole taken together leaves no doubt whatever upon my mind that the cases were well made, properly packed, and safely deposited on board the brig.

The testimony of the men who aided in putting the boxes on board, has also been taken under a commission, and introduced in evidence by the respondents. It substantially agrees with that of Beal and Forman. The testimony of Pettit, who was engaged in receiving the cargo on board of the May Queen, does not contradict that of Beal and Forman, but proves another fact to which the witness Forman does not allude. It is, that he (Forman) was informed at the time cases were put on board, that the owners would not be responsible for breakage.

The important question to be determined is, does the stamp on the bill of lading, to which reference has already been made, taken in connection with the declarations made by Pettit to Forman, so far limit the responsibility of the vessel, as to exempt her from all liability for the loss? There is no direct evidence to show when or how the breakage was caused. I am, however, perfectly satisfied that it was not caused by any carelessness or want of skill on the part of the witness Forman, and those employed by him, in putting the cases on board, and placing them between decks. Up to the time when they were left by Forman, I am satisfied they were safe and sound. The breakage then, must have occurred after the shipment, and before the boxes were delivered to the consignees on the levee in this city. The testimony of the cartmen shows that the contents of the boxes were broken before they were received into the carts. They were therefore broken while the boxes were in the care and custody of the officers of the vessel, or those employed by them. Whether the breakage was the result of the straining of the vessel, caused by the violence of the wind and waves, or of the carelessness or negligence with which the boxes were finally stowed, or in the handling them when they were delivered upon

Brig May Queen.

the wharf, are questions which can be settled by no direct evidence. And so far as the libellant is concerned, it would be difficult, if not impossible, to produce direct proof, if such should be required. The general rule of law is, that in all cases of loss, the *onus probandi* is on the carrier to exempt himself from liability; for *prima facie*, the law imposes upon him the obligation of safety. Story on Bailments, § 529. In cases where notices are given by the common carrier for the purpose of qualifying or limiting his responsibility, the burden of proof of negligence is on the party who sends the goods, and not of due diligence on the part of the carrier; which is contrary to the general rule in cases of carriers, where there is no notice. Story on Bailments, § 573. It is now well settled, that a common carrier may qualify his liability, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight and the like; as for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly. But the right of a common carrier, by a general notice, to limit, restrict or avoid the liability devolved on him by the common law, on the most salutary grounds of public policy, has been denied in American courts, after the most elaborate consideration; and therefore a public notice by stage coach proprietors, that "all baggage was at the risk of the owners," though the notice was brought home to the plaintiff, has been held not to release them from their liability as common carriers. 2 Greenleaf on Evidence, § 215.

But it is contended on behalf of the respondents, that the common law liability of the carrier, has been in this case limited or qualified by an express agreement. The question has often been made, whether it is competent for the carrier to restrict his obligation even by a special agreement. It was very fully considered in the case of *Gould et al. v. Hill et al.*, 2 Hill, 623, and the conclusion arrived at that he could not. See also *Hollister v. Nowlen*, 19 Wendell, 240; and *Cole v. Goodwin*, Ibid, 272, 282. The Supreme Court of the United States, however, in the

case of the *New Jersey Steam Navigation Company v. The Merchants' Bank*, 6 Howard, 344, held that as the extraordinary duties annexed to his employment, concern only, in the particular instance, the parties to the transaction, involving simply rights of property, the safe custody and delivery of the goods, no well founded objection to the restriction could be perceived, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties.

The owner, by entering into the contract, virtually agrees, that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.

The right thus to restrict the obligation, is admitted in a large class of cases, founded on bills of lading and charter parties, where the exception to the common law liability (other than that of inevitable accident), has been from time to time enlarged, and the risk diminished by the express stipulation of the parties. The right of the carrier thus to limit his liability by the shipment of goods, has never been doubted.

But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. The Supreme Court of the United States, having expressed these views fully in the opinion referred to, further declare that "the burden of proof lies on the carrier, and nothing short of an express stipulation by parol, or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties

should not depend upon implication or inference, founded on doubtful or conflicting evidence; but should be specific and certain, having no room for controversy between the parties."

The special agreement relied on in this case, arises from the stamp on the bill of lading, and the declarations made by the witness who received the boxes on board, that the vessel would not be responsible for breakage. In regard to the stamp referred to, I confess I cannot attach to it any importance. It seems to have been kept ready for a convenient resort, to limit or qualify the obligations of the ship owner without any notice to the shippers. There is no evidence that the latter in this instance, assented to the limitations of the liability of the former, which it has been attempted to create, by means of this stamp. I am by no means convinced from such evidence, that there has been "such a certain and specific contract between the parties as leaves no room for controversy." The evidence in the cause shows, moreover, that the stamp is false in point of fact. It was not true that the contents of the boxes were unknown. The witness Forman, who put the boxes on board, states, that "the clerk, the captain and the mate were there, and that he told them of the contents of the boxes, and that if roughly handled, they would be broken. The mate replied that he would have the superintending of the taking them out, and that he would see that they were handled carefully. The witness asked particularly if there was any danger of the goods shifting in the vessel at sea. They, the captain and mate, replied, there was not."

But it is urged on behalf of the respondents, that the person who was engaged in receiving cargo on board the May Queen, expressly stated to the witness Forman, that the vessel would not be responsible for breakage. This witness it will be remembered, was the maker of the cases which are the subject of litigation, and from abundant caution, superintended their shipment; but in no just legal sense can he be regarded in the light of the shipper. The consignors and shippers acting for the owner of the cases residing in Memphis, Tennessee, were Caldwell & Co.; and I am aware of no principle of law which will hold them bound by the stipulations of a contract, to which there is no proof they ever assented. It is not shown that Forman had any

Brig May Queen.

authority to make on their behalf, a special agreement of so important a character as would exempt the vessel from the usual and well established responsibilities of a common carrier. It does not appear that the witness assented at all to the declaration on the part of the person who was receiving the cargo ; it is perfectly clear that he did not assume authority to make a contract binding upon the shippers ; and the court is therefore bound to say that the exemption from liability claimed for this vessel, has been made to depend upon implication or inference founded on doubtful or conflicting evidence ; and that it is not of that specific and certain character, which according to the decision of the Supreme Court of the United States, already referred to, should leave no room for controversy between the parties. But even if we admit that there was a special agreement in this case between the shippers and the owners, by which the liability of the vessel as a common carrier was limited, it has never been held that such a contract could be pleaded as an exemption from responsibility for any loss or damage resulting from gross negligence or misfeasance in the master or his servants. 2 Kent's Com. 607 ; Story on Bailments, § 558. It has been satisfactorily shown that these cases were put on board with great care under the superintendence of the witness Forman, and that they were left safe and in good order by him in the custody of the officers of the vessel. If they have not been delivered in like good order and condition, the conclusion is irresistible that the care and caution which were observed in putting them on board, were wanting on the part of those employed in unlading and placing them on the levee. The officers of the vessel knew perfectly well the contents of the boxes, and a failure on their part to observe every precaution necessary to insure their safe delivery, must be regarded as such gross negligence as subjects the vessel to the usual liability for the loss by breakage. The same conclusion must necessarily follow, if after they were left by Forman, they were finally stowed in such a manner as to render them liable to be jostled against other articles by the motion of the vessel.

The proctor for the respondents has relied upon a protest which was made by the second mate of the May Queen, and

Big May Queen.

which was not afterwards extended in consequence of the death of the master, to show that the breakage may have been caused by the perils of the sea. Even if the protest could be received as conclusive evidence of all the facts it contains, there is no fact stated in it, which would justify the court in saying that the damage complained of was caused by the winds and waves, or by any other cause absolutely beyond the control of the officers of the vessel. Such a conclusion would be a mere presumption or inference from a general statement, that at certain intervals of the voyage the vessel experienced hard rain squalls which caused the vessel to labor hard. But whether these squalls actually produced the damage alleged to have been sustained in this case, must be left to conjecture only.

But I am satisfied that this protest cannot be received as evidence to establish the facts for which it was introduced. As a general rule it is difficult to perceive upon what ground such *ex parte* statements as are contained in protests, can be admitted to determine a controversy between the vessel and the shippers. The latter, having, as in this case, no opportunity of cross-examining the persons who make the statements, can rarely be prepared to counteract the effect which such statements, if admitted, would be calculated to produce. If such evidence could be permitted to prevail in a case like this, the shippers of cargo would be placed at the mercy of those who navigate the vessels upon the high seas, and who by their usually extravagant descriptions of the storms and tempests they encounter, would have it in their power to cause every case of damage involving a doubt, to be ascribed to the perils of the sea. "In a seaman's protest," says Judge HOPKINSON in the case of *The Elvira*, Gilpin, 61, "the waves are always mountain high, the winds never less than a hurricane, and the peril of life generally impending. There may be some pride of authorship in these compositions, and the writer may aim to exhibit his power and skill in describing dangers."

In the case of *The Betsey Gaines*, 2 Haggard, the protest by the master attested by two of his seamen, was offered as evidence. It was objected to as quite inadmissible upon the ground that it was *res inter alios acta*; and Lord STOWELL said: "I should be

474 DISTRICT COURT OF THE UNITED STATES.

The Georgia and Dresden.

unwilling to allow a protest to be introduced that has been properly described as *res inter alios acta*. I therefore reject the protest and the article that pleads it." But I consider the authority of Abbott on Shipping, 466, as conclusive on this point. "The protest," says that authority, "is a declaration or narrative by the master, of the particulars of the voyage, of the storms or bad weather which the vessels may have encountered, the accidents which may have occurred, and the conduct, in cases of emergency he had thought proper to pursue. With whatever formalities drawn up, it cannot be received in our courts as evidence for the master or his owners; but it may be evidence against him and them, and he should take care to supply from the log-book, his own recollection and that of the mate, or trustworthy mariners, true and faithful instructions for its preparation."

After an attentive examination of the law and evidence in this case, I am satisfied that the libelant is entitled to recover the damage he has sustained in consequence of the breakage complained of; and it is therefore ordered that there be judgment in his favor against the brig *May Queen*, for the sum of five hundred and sixty dollars, with five per cent. interest from the 17th of October, 1853, and the costs of suit.

J. C. SINNOTT, Owner of STEAMBOAT GEORGIA v. THE STEAMBOAT DRESDEN.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. M'CALEB, JUDGE.

1. There is no general rule of navigation on the Mississippi more uniformly observed by pilots of steamboats than that which requires the descending boat to run down the bend where she finds the strongest current and the deepest water, and the ascending boat to hug the bar as close as she can with safety, in order to avoid the resistance of the current.
2. Where it appears that two steamboats were meeting on the Mississippi river and

The Georgia and Dresden.

the pilot of the ascending boat gave the signal of *two taps* of his bell, thereby indicating his determination to steer to the larboard in order to take the bar shore, and his signal was answered by the pilot of the descending boat also with *two taps*, thereby indicating his acquiescence in the propriety of the signal, it was the duty of the latter promptly to steer to the larboard in order to avoid a collision.

3. The rule 3d of the rules and regulations adopted by the board of supervising inspectors in compliance with the requisitions of the act of Congress approved 30th of August, 1852, purports to be a rule to regulate the movements of steamboats meeting in *fogs* and *narrow channels*. The term *narrow channel* is absurd when applied to that of the Mississippi river at any stage of water or at any point below the mouth of the Ohio, and the term as used in the rule doubtless refers to the channels of the *shoots*, so called by river-men, which running off from the main river form islands by falling into it again.
4. When two steamboats are meeting on the Mississippi river, and there is danger of collision, it is the duty of the descending boat as a general rule, to ring her bell and shut off her steam; and it is the duty of the ascending boat to do the maneuvering.
5. On application for a rehearing. *Held further*, that declarations of witnesses as to distance in the night time must be received with many grains of allowance. Conclusions drawn by witnesses as to objects discerned at a distance, are uncertain.

Mr. Finney, proctor for libelants.

Mr. Reese, proctor for respondents.

McCALEB, J.—In this case, it appears from the evidence that the steamboat Georgia, of which the libelant was owner, came into collision with the steamboat Dresden in the Mississippi river, at a point about four miles below the mouth of the Ohio. The Georgia was descending and the Dresden ascending at the time of the occurrence, which happened at about 11 o'clock at night on the 3d of August last.

The proper position for descending boats at the place of collision is from one hundred and fifty to two hundred yards from the Kentucky shore. The distance is increased by the testimony of some of the pilots to from two hundred to two hundred and fifty yards, which they say boats descending may with propriety run. Ostrander, the pilot of the Georgia, who was at the wheel at the time of the collision, says that his boat was about two hundred and fifty yards from the Kentucky shore when he first tapped his bell upon discovering the lights of the Dresden. The other pilot of the Georgia, by the name also of Ostrander,

The Georgia and Dresden.

who came out upon deck upon the ringing of the bell, says the Georgia was about one hundred and fifty yards from the Kentucky shore, and that this is the usual and proper place for descending boats. A large majority of the witnesses testify in favor of this distance, which is one hundred yards less than the pilot at the wheel declares his boat was running at the time of the occurrence. The witnesses on the part of the Dresden, generally testify that the collision occurred from two hundred and fifty to three hundred yards from the Kentucky shore. The pilots who have been examined, vary in their opinions as to the proper course of descending boats. Some of them are of opinion that it is best to run the bend, except in high water, while others, and those, I think, the most experienced, and therefore most to be relied on, are decidedly in favor of running up along the bar or Missouri shore. Among these last is Reuben Miller, who has been a pilot for thirty years. His opinion certainly is in accordance with the general rule of navigation on the Mississippi river, for there is perhaps no general rule on this subject which is more uniformly followed by pilots, than that which requires the descending boat to run down the bend where she finds the strongest current and the deepest water, and the ascending boat to hug the bar as close as she can with safety, in order to avoid the resistance of the current. I am satisfied that the pilot of the Dresden was acting in accordance with this general rule when he tapped his bell twice to indicate his determination to run up the bar shore. He seems to be a man of great experience in his business, having followed it for seventeen years. The same cannot, I think, with propriety be said of the pilot of the Georgia. According to the testimony of his brother he is only twenty-four or twenty-five years of age, and has been piloting as a regular pilot only four years. He seems to have been deficient in the coolness and skill necessary for the emergency in which he was suddenly called to act. There seems to have been no necessity for excitement or confusion. He admits that a descending boat could be seen on the river near the place of collision at the distance of five miles, and that he saw the lights of the Dresden at the distance of four miles. He declares that he gave the first signal of one tap, indicating his determination to

The Georgia and Dresden.

steer to the right, when the Dresden was at the distance of four hundred yards. It is doubtless true that he gave the first signal, but I am satisfied from the testimony of those on board the Dresden, that it was not heard by the pilot of the latter boat. It was not even heard by the engineer of the Georgia. There was, therefore, no error committed by the pilot of the Dresden in giving two taps to indicate his determination to take the bar shore, and it was clearly the duty of the descending boat to go to the larboard after this last signal of two taps was answered by her. It seems to have been given in time to have avoided the collision. The determination of the ascending boat must have been apparent even before the signal was given, by the very fact that she was from two hundred and fifty to three hundred yards from the Kentucky shore, and was steering for the Missouri shore. There seems to be no difference of opinion among the pilots who were examined, in relation to the duty which devolved upon the pilot of the Georgia to steer to the larboard as soon as he responded to the signal in a manner to denote his acquiescence in its propriety. The duty of doing the maneuvering, as usual, devolved upon the ascending boat, and there is a fair ground for believing that his duty would have been successfully performed, if proper precautions had been taken by the descending boat to shut off steam and keep to the larboard. I am by no means satisfied that the headway of the Georgia was stopped at the time of the collision. The pilot declares that he is not sure that the starboard engine was not in motion, though he testifies that he rang the bell to stop it.

I am by no means satisfied, therefore, that the libellant's boat was not in fault; and so far from having made out his case so clear as to place the justice of his demand beyond a reasonable doubt, my opinion, after a thorough examination of the evidence, is decidedly in favor of the course pursued by the officers of the Dresden.

My attention has been particularly directed to rule 3d of the rules and regulations adopted by the board of supervising inspectors in compliance with the provisions of the 29th section of the act of Congress, entitled "An act to amend an act entitled an act to provide for the better security of lives of passengers

on board of vessels propelled in whole or in part by steam, and for other purposes," approved the 30th of August, 1852. These rules and regulations were adopted on the 29th of October, 1852. By the rule 3d, to which reference has been made, the pilot of the descending boat is required to keep the channel and check his engine, using only sufficient steam to give her steerage, until the following signals are given and answered: It shall be the duty of the pilot of the ascending boat, as soon as the other shall be in sight and hearing, to sound his bell once if he shall wish to keep his boat to the right; and it shall be the duty of the pilot of the descending boat to answer the same promptly by one stroke of the bell; if not answered, the pilot of the ascending boat shall strike his bell again and again, at short intervals, until heard and answered by the pilot of the other boat. But if the pilot of the ascending boat shall wish to keep his boat to the left, he shall strike his bell twice, and it shall be the duty of the pilot of the descending boat to answer the same by two strokes of his bell, and both boats shall be steered accordingly. The first signal shall be given by the pilot of the ascending boat, and it shall be the duty of the other to answer promptly; but in case the pilot of the ascending boat does not make the signal in proper time, the pilot of the descending boat shall make the signal, and the other shall answer promptly."

The rule is evidently intended, by the language employed, to apply to the navigation of "narrow channels or in fogs." It is, in my judgment, quite absurd to speak of the channel of the Mississippi river at any stage of water as a narrow channel at any point below the mouth of the Ohio; and we are told by the old and experienced pilot, Reuben Miller, who was examined in this case, that on that part of the river where the collision occurred he would run an ascending boat four hundred yards from the Kentucky shore, and that there is that width of what he terms good water. There was no fog on the river at the time of the collision. It had been raining, but that had ceased and the night was clear. The witness Miller also states that "descending boats come down near the Kentucky shore. Boats going up very frequently keep in the bend, but if there is a boat coming down, they keep near the bar."

The Georgia and Dresden.

The rule adopted by the supervising inspectors refers, doubtless, to the channels of the narrow *shoots* as they are technically termed by the river-men, which running off from the main channel form islands, and fall again into it. These in a high stage of water are frequently navigated by steamboats, because they greatly abridge the distance. A channel of four hundred yards cannot reasonably be regarded as a narrow channel, and no difficulty could possibly arise in navigating such a channel on a clear night if pilots understand their duty, and are familiar with the customs of the river. But I do not understand that the rule invoked, even if applied to the main channel of the Mississippi, as well as to its tributaries and narrow shoots, was designed to change the rule of navigation already well recognized. In the first place, has the libellant in this case shown beyond a reasonable doubt, that he kept the channel and checked his engine, using only sufficient steam to give her steerage, until the signals were given and answered? In this case she gave the first signal which was not heard by the ascending boat; but it does not appear that when she gave the signal she at once checked her engine, and used only sufficient steam to give her steerage. Her own pilot testifies that he did not ring to stop the engines until the signal of two taps was given by the pilot of the ascending boat, and it is extremely doubtful whether or not the starboard engine of the Georgia was stopped at all. If those of the witnesses on the part of the Dresden, who speak of this alleged fact, are to be believed, it is certain that it was not. So far as it relates to the conduct of the pilot of the Dresden, the rule seems to have been substantially complied with. He did not answer the first signal of the Georgia, because he did not hear it. He gave his signal of two taps, not indeed as soon as the Georgia was in sight and hearing, but when she was between three and four hundred yards off; and this was amply sufficient to enable the descending boat to avoid the collision if she had taken all necessary precautions. It must be remembered that the ascending boat is always required to do the maneuvering. She is not by the general rule of navigation, to stop her engine. In the case before the court, however, the Dresden seems to have done so to break the force of the collision, when it was apparently unavoidable.

The Georgia and Dresden.

I am of opinion that the libelant has not presented such a case by the evidence on the record, as should entitle him to a decree for the damages he has sustained. I consider those damages to be the result of the negligence and want of skill on the part of the pilot of his own boat and his libel must therefore be dismissed, with costs.

Sinnott v. Steamboat Dresden.—On application for a rehearing. Subsequently on the part of the libelants, application was made for a rehearing.

April 18, 1854. McCALDER, J. delivered the following additional opinion:

I have again examined the evidence in this case, and after mature consideration must adhere to the opinion already given. The declarations of witnesses in reference to distances must be received with many grains of allowance. We know how difficult it must be to determine the precise position of boats in the night time, and how uncertain must be conclusions drawn by witnesses who speak of objects discerned at a distance. In giving my opinion, therefore, I do not pretend that the distance of the Dresden from the Kentucky shore was precisely that which the witnesses say it was. It may have been one hundred or one hundred and fifty yards less. But what I designed to convey in the opinion already rendered, is, that she had proceeded sufficiently far to indicate her determination to take the bar shore even before she rang her bell, and that she was making the proper exertions to accomplish her object when the collision occurred.

The new trial is refused.

PETER KRAMME *et al.* v. THE SHIP NEW ENGLAND.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. McCALEB, JUDGE.

1. Parties to suits in admiralty must be bound by their allegations and proofs, and the former, to be effectual, must be sustained by the latter.
2. When the allegations of the libel are not sustained by proof, the libel will be dismissed.

T. J. Durant, proctor for libelants.

E. A. Bradford, proctor for respondents.

McCALEB, J.—The libelants are a portion of a large number of German emigrants who arrived in this port in the month of December last, in the ship *New England*, from Bremer Haven. The voyage commenced about the 31st of October, 1853, and lasted fifty-eight days. The libel alleges that in consideration of the sum of thirty Bremen dollars, being about \$23 United States currency paid, the libelants each and their families were to be provided with a steerage passage from Bremer Haven to New Orleans in the ship *New England*, with not less than fourteen clear superficial feet of the lower deck or platform, for one passenger; and that three quarts of water per day during said voyage should be furnished to each passenger, and that there should be furnished to each passenger per week during said voyage, one-tenth of fifteen pounds of good navy bread, ten pounds of rice, ten pounds of oat meal, ten pounds of wheat flour, ten pounds of peas and beans, thirty-five pounds of potatoes, one pint of vinegar, sixty gallons of fresh water, ten pounds of salted pork free of bone, all to be of good quality, with liberty to supply and substitute one pound of either of the above articles in lieu of five pounds of potatoes to each passenger, and all cooking to be done by the cook of the vessel and at the vessel's expense.

The Ship New England.

The libel further alleges that shortly after the sailing of the ship, the captain and owners withheld from and refused to furnish to libelants and their families any water whatever, for the space of three weeks; during which time over one hundred passengers in the ship died, and afterwards the libelants were put on short allowance of water during the remainder of the voyage; and the captain and owners during the whole voyage violated their entire contract of passage, and failed to furnish the libelants and their families, during the said voyage, with the water and provisions stipulated to be furnished by the agreement, whereby libelants and their families during the voyage suffered great want, hunger, thirst and starvation, to the great injury of the health, and deprivation of the comfort, and danger of the lives of the libelants and their families, for which each of them for himself, and for his wife, and for each of his children, claims five hundred dollars.

The answer of the claimants sets up a general denial of these allegations of the libel, and avers that on or about the 29th of Sept. 1853, Isaac Orr, acting as master of the ship New England, and for and on account of the claimants, entered into a contract of charter party, with F. W. Bodiker, jr., of Bremen, agent for merchants and freighters, that the said ship New England should proceed to Bremer Haven, and there being properly fitted and prepared for the purpose, should receive on board the full complement of between-deck passengers, which said vessel was allowed to take according to the laws of the United States, and which said merchants and freighters engaged to ship, together with their luggage, the requisite quantity of water, provisions, fuel, &c., according to the American and Bremen laws, and therewith proceed to New Orleans, where the passengers and their luggage were to be delivered, &c.

The answer further avers, that the contract was duly fulfilled on the part of the ship New England: that at all times throughout the voyage from Bremer Haven to New Orleans, the passengers on board the ship were duly supplied with provisions and water in pursuance of the contract; or if any change was made, it was made in accordance with the request and suggestions of the passengers on board.

The Ship New England.

The answer specially and earnestly denies that the proper supply of water and provisions was either withheld or refused to the passengers, or that any of the said passengers on board of the *New England* suffered either want, hunger, thirst or starvation to the injury of their health, the deprivation of their comfort, or danger of their lives; and it further avers that in all respects during the voyage, the master of the ship and all the other officers and the crew thereof, labored to alleviate the sufferings of the unfortunate passengers who were attacked by sickness, and to promote the comfort, so far as was in their power, of all on board.

I have attentively examined the evidence adduced on the trial of the cause, and without extending this opinion to an unreasonable length by a minute commentary on that evidence, I shall proceed to give rather the conclusions to which I have been led, than a detail of the particular facts from which those conclusions have been formed.

I deem it unnecessary to go into the inquiry how far the master of the *New England* violated the provisions of the acts of Congress in taking on board his vessel a larger number of passengers than those acts prescribe. It is certain that no complaint has been specifically made against him on that ground, and no evidence has been introduced to sustain it. The libelants have not shown that they were unnecessarily crowded, or that a want of room on board was the cause of their alleged sufferings. If the master were on trial for an infringement of the regulations of Congress upon this subject; if he were a defendant in a prosecution instituted to enforce a penalty or a forfeiture for a non-compliance with those regulations, it would be proper to inquire how far the legislation of Congress as it now exists in reference to the subject, would meet the exigencies of the case. But it is proper that the parties should be held bound by the allegations and proofs, and the former, to be effectual, must be sustained by the latter.

The specific allegations in the libel to which the evidence has been directed, and which have been mainly relied on by the proctor of the libelants, are those which relate to a want of provisions and a want of water.

The evidence for the libelants has been positively contradicted by that introduced by the respondents, and it becomes the duty of the court, as it would be the duty of a jury under similar circumstances, to decide upon the credibility of the witnesses.

I am satisfied that there was no want of provisions. The stipulations of the charter party seem to have been fully complied with; and if there was any deviation from time to time from the agreement, it took place at the express solicitation of the passengers themselves. If, for instance, a particular article of food was preferred to the one prescribed, the taste of the passengers was consulted and gratified. If all the different articles of food called for by the contract were not at all times the most wholesome for persons suffering as many of these passengers were from the effects of a distressing and fatal disease, it was a misfortune and a contingency which the parties to the contract could not foresee or guard against. Whatever could be reasonably expected under the circumstances seems to have been done by the master and his officers to alleviate the sufferings of the unfortunate beings committed to their care.

In reference to the charge of withholding water from the passengers, the testimony of the libelants (several of whom were examined) and other emigrant passengers, is unequivocally strong and positive; and if it were true, would certainly convict the officers of this vessel of an offence revolting to humanity, and one which would call loudly for the interposition of the criminal laws administered by this court. But much of this evidence is too strong for human belief. The witnesses testify to what, in the nature of things, cannot be true. When they declare that for three weeks after the vessel sailed from Bremer Haven they received no water whatever, their statements assume a character of extravagance and improbability which place them beyond the pale of credibility. Some of them even declared that they received no fluid whatever. Wilhelm Schnitz being asked "if during the first three weeks any fluid was given to the passengers at all," witness answers that "neither tea nor coffee, nor anything was given to them to drink." And yet notwithstanding this privation for so long a time, the witness survived to tell the tale, and both he and his wife arrived safely in this port. But

The Ship New England.

he himself, upon cross-examination, states that he received coffee and tea, but not regularly; he had to do without tea sometimes in the evening. He received them during the first three weeks, but not regularly.

The witnesses introduced on the part of the libelants, almost without an exception, declare that the cause of the sickness which prevailed so extensively and so fatally on board this vessel, was the want of water. This is positively contradicted by the fact that some of the passengers were sick when they came on board, and several of them died before they left the river at Bremer Haven, and were carried on shore for interment. That a disease strongly resembling cholera in its symptoms prevailed on board this vessel, there can be no reasonable doubt. That it prevailed to a limited extent in the emigrant houses in Bremer Haven at the time the vessel sailed, there can be as little doubt. This is evident from the fact that the deaths before alluded to, occurred so soon after the emigrants embarked; and from the fact that a similar disease prevailed on other emigrant vessels which left Bremer Haven for this port shortly after the New England.

It is a singular fact in connection with the evidence of the libelants, that notwithstanding the serious charges in the libel against the master of the New England, the witnesses invariably speak of him as one who did them no harm, and many of them detail facts which show him to have been uniformly kind and humane towards the passengers; that he contributed from his private stores to alleviate the sufferings of the sick, and resorted to expedients to induce all to leave as often as possible the close air of the cabin between decks for the pure air of the upper deck. I am satisfied from the evidence, that he was not deficient in proper attentions to his passengers, and that in his offices of humanity he was kindly and actively aided by his wife, who was also on board. The testimony of Mary E. Lysaght, who was the stewardess on board the New England, shows that "when the sickness was prevailing on board, the captain went down between decks very frequently. She knows that he took things down to the sick very often. The sick sent to him for wine and medicines, and he always furnished them. She has seen Mrs. Orr, the captain's wife, go among the sick on deck

The Ship New England.

inquiring about and taking notice of them. She has seen her preparing drinks for them, gruel, wine, sago, which she gave to them, and this every day, almost from the time the sickness began and while it continued. The witness was kept running all the time to wash up the bowls and dishes which she (Mrs. Orr) used for them: Mrs. Orr waited on the sick, and the witness waited on her."

This witness also testifies that she went to the ship's galley very frequently. The passengers' galley was right alongside. She went there every day very often. She says that coffee was made for the passengers every morning except one, when it blew so hard that they could not get water, and no fire was on that day lighted in either galley. Tea was made in the passengers' galley every evening, except on the one day spoken of. The carpenter and the boy gave out the water. The witness never heard any complaint from any of the passengers, that they did not get water enough. She never saw anything which made her suppose that they were in want of it. A man called Kunk and one called Nieland and some others, could talk English; others than Kunk and Nieland but little. These always told the witness that the passengers were very well satisfied; that the captain was a very good man to them. The witness declares that she heard the captain ask Kunk particularly if the passengers were satisfied, and he told the captain that they were perfectly satisfied; that they wanted nothing. The evidence of this witness on many material points, is fully corroborated by the first and second stewards and by the officers and seamen of the vessel.

The testimony of the mate shows that the vessel sailed with 424 passengers; that before the vessel left Bremer Haven, four passengers died, and their bodies were taken ashore. He cannot exactly state what was the nature of the sickness, but would judge it was cholera; he thinks so from the fact that the persons attacked, had cramps, and they generally died after a short illness. The sickness continued from fifteen to twenty days; the sick got gradually better as the vessel got into a warmer latitude. Three of the crew died; they had the same kind of sickness, rather harder than the passengers. The witness, the captain and

second mate were also sick. The first day when the vessel left the docks, there were two casks full of water lashed alongside the galleys on deck, which guaged 150 gallons each. The passengers had free access to this water and used as much as they wanted. On the fourth day after sailing, those who had charge of the passengers, Kunk, Nieland and Bruns, who acted as interpreters, came to the captain and in the presence of the first and second mates, and said to him that they had made the voyage across the Atlantic several times, and found that they generally wanted water more in warm weather than in cold, and that they wished that he would give them less water in the cold weather and increase it in warm. They said that the passengers were perfectly satisfied with that arrangement; and they stated at the time that they spoke for all the passengers.

In accordance with this arrangement, it appears that the allowance for drinking was reduced to one pint per day for each passenger. The allowance for culinary purposes was, however, not diminished, and it is also satisfactorily shown that whenever a passenger desired water, it was always furnished to him. The short allowance was continued until the 20th of November, when it was increased to three pints, and in the latter part of the voyage they got as much as they wanted. On the arrival of the vessel at this port, sixty casks of water were still left. Applications for water for the sick were made both to the captain and mate, and it was always furnished. The interpreters repeatedly told the captain in the presence of the mate, that the passengers were well satisfied, and that all they wanted was to see land.

Much has been said by the witnesses for the libelants concerning the cruelty of the carpenter towards the passengers. They state that he repeatedly inflicted upon them blows. The evidence upon this subject is characterized by the same extravagance and improbability, which pervades that portion which relates more particularly to the want of water. The witnesses seem to me to be exceedingly reckless in their statements, and oftentimes utterly regardless of the solemnity of an oath. They admit the habitual kindness of the captain towards them, and his humanity is too well shown by other witnesses to be seriously

questioned. I cannot, therefore, believe that he would have permitted for a moment such acts of cruelty as those complained of. The officers of the vessel and others acting in a subordinate capacity on board of this ship, have shown clearly, that no such acts were committed. The carpenter, acting under the orders of the master, frequently experienced great difficulty and trouble in inducing the passengers to go upon the upper deck on account of their health; and it is shown that in one or two instances a conflict ensued between him and some of the male passengers, who resisted his importunities. But I am led to believe that in these conflicts, which do not appear to have been serious, he suffered much more severely than his antagonists. It is well established by the evidence, that the passengers entertained a superstitious dread of leaving the cabin and going upon deck. They had an idea and a belief, that all who went upon deck would surely die; and so far was their superstition carried upon this subject, that they refused to assist in consigning the bodies of the dead to the ocean. They resisted for some time the orders of the captain to leave the pent up atmosphere of the cabin, for the fresh air of the deck; and it is somewhat extraordinary that the very measures he resorted to for the preservation of their lives during the prevalence of a malignant disease, should now be alleged against him as acts of cruelty.

With the clear and satisfactory evidence on the part of the respondents, and in the absence of any rational or plausible motive on the part of the master for withholding from the libelants the food and drink with which his vessel was abundantly supplied, I am constrained to say, that the allegations of the libel have not been satisfactorily established by proof; and that there is no ground for a judgment for damages against the respondents or the ship which has been proceeded against in this cause.

The libel must therefore be dismissed with costs.

The Steamboat Pearl and Natchez.

BATES, BENSON & Co., Owners of the STEAMBOAT PEARL, v.
THE STEAMBOAT NATCHEZ.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. MCALEB, JUDGE.

1. The general rules of navigation of the Mississippi and the law of Louisiana requires a descending steamboat to keep the middle of the river.
2. Although a steamboat descending when near a bend, may have the right to run near the right bank, yet she is guilty of great imprudence in continuing to run near that shore, when she saw another boat ascending, apparently near the same shore.
3. When a boat ascending on the right bank, signals a boat descending, by two taps on her bell, that she intends keeping to the larboard, there is no necessity that the descending boat should run any risk in passing.

Wolfe & Singleton, proctors for libelants.

Durant & Horner, proctors for respondents.

MCALEB, J.—In this case the libelants as owners of the steamboat Pearl, have filed their libel against the steamboat Natchez, to recover the sum of \$16,500 damages, which they allege they have sustained in consequence of the sinking of their boat in a collision with the Natchez, at about half past two o'clock in the morning of the first of January, 1854.

The collision occurred nearly opposite to what is known as Brusli Landing, in the parish of West Baton Rouge. The Pearl was descending and the Natchez ascending the river. The libel states that the Pearl sank in one minute after the collision, and the testimony of the witnesses shows that she sank almost immediately.

Without commenting at length upon the mass of testimony introduced in evidence, I shall present briefly the prominent facts upon which my conclusions on the questions put at issue by the pleadings and arguments of counsel, have been formed.

The Steamboats Pearl and Natchez.

Fortunately I have not been subjected to the usual difficulty of deciding the case upon the conflicting evidence of the officers of the two boats alone. Several disinterested witnesses have been examined. Some of these witnesses were attentive spectators of the collision, from the banks of the river, and give for the most part a clear and concurring account of the situation of the boats in the river and the circumstances of the disaster. Their testimony substantially agrees with evidence given by the officers of the Natchez, and has led my mind to the conclusion that the libelants have failed to make out such a case as entitles them to relief from this court.

In the first place, it is extremely doubtful whether the signals were given on the Pearl at all; and if they were I am satisfied they were not heard on board the Natchez. The witnesses on the latter boat concur in declaring that they heard no signal bells from the Pearl, and the witnesses who were on shore at the time of the collision, testify to the same effect. The witness Hart (the overseer on Mr. Stewart's plantation) says that he heard the "bell of the Pearl tap about three seconds before the collision. You could scarcely distinguish between the time of the tap and the crash." It is needless to say that a signal given at such a moment was too late to give the necessary warning to the other boat.

In the next place, I am satisfied from the evidence, that the Pearl was not descending in her proper place in the river. The general rules of the navigation of the river and the law of Louisiana on the subject, require a descending boat to keep in the middle of the river; but admitting that in this instance, she was, according to the opinion expressed by the witness Orr, entitled to run down the bend, and that she would have been in her proper place at the distance of 200 yards from the Brusli Landing, it is yet obvious that she was guilty of great imprudence in continuing to run so near to the right bank descending, when she saw another boat ascending apparently very near the same shore. The witness Orr testifies that at the point of collision there are 800 yards width of good navigable water, and there was certainly no necessity of running any risk in passing an ascending boat, whose signals of two taps repeatedly

The Steamboats Pearl and Natchez.

given, and indicating her determination to keep to the larboard, were distinctly heard: for while we are left in doubt whether any signals were given on board the Pearl, it is rendered perfectly certain by the testimony of the libelants, that the taps from the larger and louder bell of the Natchez were distinctly heard by the pilot of the descending boat. Instead of obeying those signals and keeping out in the middle of the river, we find the Pearl continuing to run so close to the right bank descending, that she came in collision with the Natchez so near to that bank that when the pilot of that boat turned her bow out at the moment of the collision, her stern was against the shore. This fact contained in the testimony of the pilot Dunboy, is corroborated by that of Hofroge, who was on shore at Brusli Landing, and by that of Sands, who was a passenger on the Natchez. It is furthermore corroborated by Lisk, who went to the place of the collision with his diving bell with the view of saving the wreck. This witness declares that he found that the bow of the Pearl was about fifty or sixty yards from the shore. The pilot of the Pearl, on the contrary, testifies that at the time of the collision, she was 150 yards from the Brusli shore. When we take into consideration the fact that she sunk almost immediately after the collision, it is difficult to believe that the testimony of this witness can be correct.

It is by no means clearly established by the evidence, that the engines of the Pearl were stopped before the collision. I am satisfied that she had headway, and that her sinking was the consequence of a concussion produced by her own motion; for the evidence is very strong to the effect that the Natchez had not only stopped her progress, but was actually backing at the moment of the collision.

Much stress is laid by the proctors of the libelants upon the fact that the Natchez was running up near the left shore ascending before she reached the Brusli Landing. But the witness Orr examined on their behalf, shows that she had a right to cross from the bar shore, when she came up as far as the Brusli Landing; and if she was already over before the Pearl could reach that point, what just ground of complaint can the latter have? The evidence is clear that she was plainly visible running up

422 DISTRICT COURT OF THE UNITED STATES.

The Anita v. Steamboat Anglo Norman and Bark Jane E. Williams.

close along the western shore—so close that the witness Dr. Vaughn, who was riding along the bank on horseback at the time, thought she had made a landing and was just getting under way again. The evidence is equally clear that she continued regularly on her course, without crossing the track of the descending boat, and that she repeatedly gave her signals in accordance with the rules established by the inspectors, indicating distinctly her determination to keep the shore on which she was running. There could be no mistake at any moment from the time she was first descried by the pilot of the Pearl, as to her real position in the river. After an attentive examination of all the evidence, I am unable to discover any fault on the part of the officers of the Natchez. They seem to have managed their boat with prudence and skill; and their exertions after the collision, in rescuing passengers and others from the sinking boat, entitle them to the commendation of this court.

The libel must therefore be dismissed, with costs.

RAMON MARTINEZ *et al.*, Owners of SCHOONER ANITA v. THE
STEAMBOAT ANGLO NORMAN and BARK JANE E. WILLIAMS,
Respondent.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. M^CCALEB, JUDGE.

1. Where it appeared, that while the libellant's schooner and a bark were in tow of a tow-boat, both vessels being astern of the tow-boat, the schooner by some mismanagement, ran in before the bow of the bark, broke her own hawser, capsized and immediately sunk; and it further appeared that the cause of the disaster was the *shortness of the hawser* of the schooner, and the refusal of those in charge of her "to pay it out," in obedience to the orders of the master of the tow boat; it was held that neither the tow-boat nor the bark was to blame, and that the libel should be dismissed.
2. In a collision between two vessels, where it appears that one of them has neg-

The Anita v. The Steamboat Anglo-Norman and Bark Jane E. Williams.

lected an ordinary and proper measure of prevention, the burden is on her to show that the collision was not owing to her neglect, but would have equally happened, if she had performed her duty.

C. Roselius, proctor for libelants.

Benjamin, Bradford & Finney, proctors for the Anglo Norman.

, *Durant & Horner*, proctor for the Jane E. Williams.

MCCALEB, J.—In this case it appears that, while the schooner *Anita* belonging to the libelants, and the bark *Jane E. Williams* were in tow of the *Anglo Norman*, both vessels being astern of the tow-boat, the schooner by some mismanagement, ran in before the bow of the bark, broke her own hawser, capsized and immediately sunk. This suit is brought to recover the damages sustained by the libelants in consequence of the loss of their vessel; and they have filed their libel against both the tow-boat and the bark.

An attentive examination of all the evidence has led me to the conclusion that the cause of the disaster was *the shortness of the hawser* by which the schooner was towed. It is impossible, it seems to me, that the loss of the schooner could have occurred in the manner spoken of by the witnesses, if the two vessels astern had been placed at an equal distance from the stern of the tow-boat. The evidence on behalf of the libelants is very strong in support of the position assumed by their proctor, that the collision occurred in consequence of the wild and irregular steering of the bark; but on behalf of the latter vessel, it is equally strong that the schooner was to blame.

I can see no fair ground for giving judgment against either the tow-boat or the bark. The captain of the former repeatedly gave orders to the schooner, to "pay out" the hawser; and he was certainly not to blame if his orders were not obeyed. Nor could the bark be responsible for the deficiency in the length of the hawser, or the irregular steering which was the consequence of that deficiency.

I am therefore of opinion that the libelants have failed to make

494 DISTRICT COURT OF THE UNITED STATES.

Steamboat H. M. Wright.

out a case which would entitle them to the judgment of the court.

In a collision between two vessels, where it appears that one of them had neglected an ordinary and proper measure of prevention, the burden is on her to show that the collision was not owing to her neglect, but would have equally happened if she had performed her duty. 6 Law Rep. 111; Abbott on Shipping, 800, note.

The libel must therefore be dismissed, with costs.

NOTE.—The above case was taken by appeal to the Circuit Court, and the decree of the District Court was affirmed by Justice CAMPBELL.—EDITOR.

A. M. WALSH v. THE STEAMBOAT H. M. WRIGHT.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. M'CALEB, JUDGE.

1. When, on board of a passenger steamer, time and opportunity was given for a thief, without detection, to enter a stateroom of the ladies' cabin, which was properly fastened, and steal a valise, it was *Held*, that it exhibited a want of that care and watchfulness on the part of those managing the steamboat, which should always be observed in the police regulations of such a boat.
2. Those engaged in running passenger steamers are required to use such a degree of vigilance as will effectually protect from all intrusion, during the night time, at least, that portion of the boat which is appropriated for the security and convenience of helpless females.
3. Common carriers of passengers are liable for the safe transportation of passengers' baggage.
4. Articles which it is usual for persons to carry with them, from necessity, or convenience, or amusement, fall within the term baggage; as also money not exceeding a reasonable amount.
5. A gold watch and gold spectacles were, in this case, necessary to the traveler's personal convenience.
6. When the baggage of a passenger had been stolen from her room, on board a

Steamboat H. M. Wright.

passenger steamer, the admiralty court has jurisdiction over an action brought to recover its value.

Mr. Cornelius, proctor for libelant.

Durant & Horner, proctors for respondent.

MCCALEB, J.—The libelant in this case claims from the steamboat H. M. Wright the sum of \$143, as the value of a gold watch, a pair of gold spectacles, a sum of money amounting to \$11, some other small articles, and the valise in which they were deposited. These articles, it is alleged, were stolen from the stateroom of the boat, which was occupied by the libelant while the boat was on her voyage from New Orleans to Bayou Sara; and the evidence adduced in the cause leaves no doubt on the mind of the court that such was the fact. It is shown that the libelant is a lady of the highest respectability, residing in Woodville, Mississippi: that the stateroom in which the valise containing the articles stolen, was deposited, was occupied only by herself and a young lady, also of the highest respectability. It is shown that the valise was carefully deposited under her berth by the libelant when she retired to rest on the night when the robbery was perpetrated. The respondent has attempted to raise a presumption that the articles were stolen by a servant belonging to another lady of the party with which the libelant was traveling; but this attempt has been unsuccessful. The conclusion I have formed from the evidence is, that the stateroom was entered and the articles taken by some one having no immediate employment about the ladies' cabin, and having no right to be there. Whether the intruder was a person connected with the boat, or a stranger, it is unnecessary to inquire. The fact that he had time and opportunity to enter a stateroom of the ladies' cabin, which, it is shown, was properly fastened, exhibits a want of that care and watchfulness which should always be observed in the police regulations of every boat engaged in the transportation of passengers. It is certainly not exacting too much of those in charge of these common carriers to require of them that degree of vigilance which would effectually protect

from all intrusion, during the night time, at least, that portion of the boat which is appropriated for the security and convenience of helpless females.

It is well established that steamboat proprietors, who are common carriers of passengers, for hire, are liable for the baggage of passengers; and it is equally well established that they are not subject to damages for the loss of anything that is not strictly baggage. This leads us to the inquiry, what is *baggage* strictly so called?

The Supreme Court of Pennsylvania have considered that it is not obvious in what manner the court can restrict the quantity or value of the articles that may be deemed proper or useful for the ordinary purposes of traveling, because, in the nature of things, it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege, a court must rely upon the intelligence and integrity of the jury to apply the proper corrective. The defendants in the particular case in which this decision was made, requested the court to charge the jury that they (the defendants) having had no notice that the trunks lost contained jewelry, or other articles of greater value than ordinary wearing apparel, they were not liable for such articles of jewelry; but the court refused, and the jury found for the plaintiff, and the judgment was affirmed upon appeal.

"An agreement," says Angell, in his work on carriers, "to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be at all extended beyond such things as a traveler usually has with him, as a part of his baggage. All articles which it is usual for persons traveling to carry with them, whether from necessity or for convenience, or amusement, fall within the term baggage. So, likewise, does money, not exceeding a reasonable amount; and a watch has been held to be a part of a traveler's baggage, and his trunk a proper place in which to carry it." Angell on Carriers, § 115. See also 9 Wendell, 85; 19 Ib. 584; and 6 Ohio, 358.

The proctor for the respondent has contended that the articles lost should have been deposited with the clerk for safe keeping. On the contrary, they were just such articles as a lady of the

The Belleville and The Steamship United States

age and circumstances of the libelant would naturally prefer to keep about her person. They were necessary to her personal convenience, and it is not shown that she failed in taking the proper precaution for their security.

It has also been contended that this is not a case of admiralty jurisdiction. This position cannot be maintained. A contract for the transportation of passengers for hire, is a contract over which the admiralty has exercised jurisdiction from a very early period. It is distinctly mentioned among the subjects of that jurisdiction by the learned Godolphin of the Court of Admiralty in England, in the reign of Charles I. It has repeatedly, within a few years past, been a subject of jurisdiction in the United States District Court for the southern district of New York, and has been clearly recognized as such, both in the district and circuit courts. It was also recognized as such in a recent case by Mr. Justice CAMPBELL, in affirming a decree of this court.

The value of the articles claimed by the libelant has been proven, and she is entitled to a judgment for the sum of \$143, with costs.

NOTE.—This decree was affirmed on appeal by the Circuit Court.

WM. RANDOLPH, Owner of the BELLEVILLE v. THE STEAMSHIP
UNITED STATES.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. MCGALLER, JUDGE.

1. A ferry boat running in a certain track across a river, and compelled to make a certain number of trips within an hour, is not excused from taking ordinary precautions to avoid collision with a steamship.
2. Nor is a steamship, although the more powerful vessel, bound under such circumstances to steer clear of the ferry boat.
3. A ferry boat is undoubtedly entitled to her rights and privileges, but they are to

The Belleville and The Steamship United States.

be enjoyed with a due regard to the rights and duties of others, and like all others navigating the port of a commercial city, she is bound to be prepared for those occasions which call for the exercise of prudence, skill and caution.

4. A party who comes into a court of admiralty to seek relief, in a case of this nature, should show, that all proper care, skill and prudence has been observed on board of his own vessel, to prevent the disaster of which he complains.

Durant & Hornor, proctors for libelant.

W. D. Hennen, proctor for respondent.

McCALEB, J.—The libelant in this case claims damages for the loss of his ferry boat, called the *Belleville*, which was sunk in consequence of a collision with the steamship *United States*, between seven and eight o'clock in the evening of the 20th of August last. The ferry boat was making a trip across the river, from the ferry landing, in the third district of this city, to Algiers, and the steamship was proceeding up the river to her landing, at the wharf opposite Jackson square, at the time the collision occurred.

It is admitted on behalf of the libelant, that the ferry boat did not stop her engine or lessen her speed, and it is contended that having a right to a certain track across the river, and being compelled to make a certain number of trips within an hour, she was right in the course she pursued, and was not bound to take the ordinary precaution to get out of the way of the steamship; but on the contrary, that the latter, as the more powerful vessel, was bound, under the circumstances, to steer clear of her.

I am aware of no such exemption from responsibility, as that which has been claimed for this ferry boat. She was undoubtedly entitled to her rights and privileges; but they were to be enjoyed with a due regard to the rights and privileges of others. She had a right in the performance of her regular trips, to her usual path across the river to her landing in Algiers; but this right was not to be enjoyed at all times, and under all circumstances without regard to vessels coming up or down at the moment she might be making her crossing. Like all vessels navigating in the port of a large commercial city, she was bound to be prepared for those occasions which call for the exercise of

prudence, skill and caution. To release her from such an obligation, would be virtually to expect all vessels, foreign and domestic, entering our port, to know the precise moment when a ferry boat is to leave one landing for another, as well as the very track she is to pursue.

In this case, the approach of the steamship was distinctly announced by the firing of her gun. Her position in the river was plainly visible to those in command of the ferry boat. The witness Matheny, who was the pilot on the latter, at the time of the collision, testifies, that "at the time when they rang the bell on the ferry boat to leave the wharf, the steamship United States was between the tobacco warehouse and the barracks. She was then coming up on this (the Orleans) side of the river, and when she got somewhere about the cotton press, she fired a gun." And again he says, "I saw the steamship when we left our landing on this side, and knew that she was coming up the river. I told the negro on the boat to hold on, to see whether we had time enough or not to get ahead of that boat that was coming up, and when we got out, I said to Mr. Randolph, 'I don't know whether he can get ahead or not.' At the time of this remark we were as far out as the United States was, she having just fired her gun."

The evidence of this witness shows, first, that he desired to hold on, to see if they could go ahead of the steamship: that he was doubtful whether or not they would be able to do so, and that as a responsible officer in charge of the ferry boat, he thus speculated upon the chances of avoiding a collision when the delay of a minute would have been sufficient to remove all doubt or apprehension upon the subject: secondly, it shows that the witness was certainly mistaken in saying that the ferry boat was as far out into the stream as the steamship, when the latter fired her gun. If this were true it is impossible that a collision could have occurred, unless the ferry boat had remained perfectly stationary. It is satisfactorily shown that the steamship was ascending in the usual track of steamships proceeding to the landing opposite Jackson square; that she was running at about one quarter, or one-third of the distance of the width of the river from the Orleans shore. It is also shown that there was ample

500 DISTRICT COURT OF THE UNITED STATES.

The Belleville and The Steamship United States.

time for the ferry boat to have gone far beyond her track, if it were true that the latter was as far out into the stream, as the testimony of the witness Matheny, would lead us to conclude. The steamship was running directly to her usual landing place, and when she deviated from her course, it is apparent from the evidence, that she did so, for the purpose of avoiding a collision when the ferry boat was discovered to leave suddenly the Orleans shore, and run directly across her bow.

On the part of the steamship, it has, moreover, been abundantly proven, that she was provided with all the requisite signal lights: that she had a good look-out on board: that her officers were at their posts, and promptly performed their several duties: that her usual speed had been lessened at some distance below: that when there was a prospect of a collision, her engines had been stopped and backed: and finally, her helm was put a-starboard for the purpose of turning her in the same direction the ferry boat was running, and thus breaking the force of the collision.

I am of opinion that the ferry boat was wanting in proper prudence and precaution in leaving the shore at the time she did; that she was to blame for running directly across the track of an ascending vessel, and for failing to stop her engines, and using the usual precautions for avoiding a collision. A party who comes into a court of admiralty to seek relief in a case of this nature, should show that all proper care, skill and prudence, had been observed by those in charge of his own vessel, to prevent the disaster of which he complains. This, the present libellant has failed to do, and his libel must be dismissed with costs.

NOTE.—This decree was affirmed on appeal to the Circuit Court, by Mr. Justice CAMPBELL.

LALLANDE and TONG v. THE STEAMBOAT C. D. JR., Respondent.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. McCALEB, JUDGE.

1. All navigable streams should be left open, and no one has a right to obstruct the path of vessels along their channels.
2. Where, a raft had been driven by the *vis major* into a channel of the river, and obstructed it and had remained there an unreasonable length of time, and no anxiety had been exhibited by the party in charge, and no exertion made by him to extricate it, that would afford ample grounds for the master of a steamboat to take the necessary steps for its removal.
3. But when every effort was made to remove the raft from the channel, no apprehensions of a pecuniary loss on the part of the steamboat from a reasonable delay would afford an excuse or justification for the violent and summary destruction of the raft by the master of the steamboat.

F. Clark, proctor for libelants.

S. L. Johnson, proctor for respondent.

McCALEB, J.—This action has been instituted by the libelants to recover the value of a raft of cotton wood logs which it is alleged was almost entirely lost in consequence of the acts of the master of the steamboat C. D. jr. The raft in question was, on the night of the 25th of March last, driven by the force of the wind from its position, while coming down the Mississippi river, into the mouth of the Bayou Lafourche. While it was lying in that position, the steamboat C. D. jr., then on her voyage from New Orleans to Thibodeauxville, arrived at Donaldsonville, and attempted to enter the bayou Lafourche. In making the attempt she ran foul of the raft, and was unable to effect her entrance into the bayou. On the following morning, the libelants proposed to the master of the C. D. jr. to tow the raft from the mouth of the bayou into the river; but this the latter refused to do. He however insisted upon the immediate removal of the raft, and threatened in case his wishes were not speedily

502 DISTRICT COURT OF THE UNITED STATES.

Lallande and Tong v. The Steamboat C. D. Jr.

acceded to, to order the raft to be cut, and let the logs float with the current down the bayou. The libellant Lallande, then endeavored to secure the assistance of the steamboat Music, in getting the raft towed out of the mouth of the bayou; but before that assistance could be rendered, the master proceeded to cause the raft to be cut up, and almost all the logs thereupon floated down the bayou and were lost. The few logs that were recovered, were sold at Donaldsonville for a price below their real value at Carrollton, whither the raft was proceeding at the time it was driven by the force of the wind into the mouth of the bayou.

The respondents have also set up a claim for damage alleged to have been sustained in consequence of the loss of time and passengers, caused by the obstruction of the entrance of the bayou. Their right to recover must, however, depend upon the question whether the raft was driven into the position in which it was found by the steamer, by the force of the wind, or in consequence of a want of skill and caution on the part of those who had charge of it. The evidence leaves no doubt upon my mind that every exertion was made to prevent the raft from drifting into the mouth of the bayou; and that the misfortune of the libellants was solely the consequence of *vis major*, a power to which they could oppose no effectual resistance, and over which it was impossible under the circumstances as detailed by the evidence, to exercise the requisite control.

Having thus disposed of the claim of the respondents, I will proceed briefly to consider the only question which properly arises in this case, viz: how far the conduct of the captain of the C. D. jr. was, under all the circumstances disclosed by the evidence, justified.

It is unquestionably true that all navigable streams should be left open, and that no one has a right to obstruct the path of vessels along their channels. It is equally true that a nuisance may be abated; and if it were shown in the present case, that the raft had remained in the position into which it had been driven, for an unreasonable length of time; if no anxiety had been exhibited by the party in charge of it, and no exertion made by him to extricate it, there would have been ample

grounds for the master of the steamer to take the necessary measures to have it removed. What those measures should evidence have been, it is now unnecessary to decide; but the shows no sufficient reason for justifying or excusing the summary proceeding resorted to. A single night only had intervened since the misfortune had occurred. The party in charge of the raft, exhibited the greatest solicitude to remove it, and was actually exerting himself to obtain the assistance of a steamboat to enable him to accomplish his object, at the very time the order to cut loose the logs, was given and executed. It has been contended that it was impossible even with the assistance of the steamer *Music*, to remove the raft. But the evidence does not; I think, fully authorize the conclusion. The captain of the *Music* testifies that it was impossible for his boat to pull the raft from its position, while the violence of the wind continued; and I am by no means satisfied that if proper measures had been resorted to, to separate one portion of the raft from the other, that it could not have even then been drawn from its position. But I see nothing extraordinary in requiring a reasonable delay for the wind to lull, and thus afford to the libelants a fair opportunity to make an effort to remove the obstruction. It would have been more in accordance with that generosity which is always due to those in misfortune, and more consonant with the dictates of common justice, if the master of the *C. D. jr.* had proffered the assistance of his own boat to relieve the property of the libelants from the position in which a force beyond their control had placed it, especially when an offer was made to compensate him for his services. The hot haste and violence he exhibited in destroying the raft show such a total disregard of the rights of the libelants, that, sitting as I do, in a court of high equity powers, I feel fully authorized by the evidence to hold him responsible for the consequences of his recklessness and temerity. I cannot give my assent to the doctrine that misfortunes are to be punished as crimes or faults; or that mere apprehensions of a pecuniary loss from a reasonable delay, are to be received as an excuse or justification for the summary and violent proceedings resorted to by the master of the steamer in this instance.

504 DISTRICT COURT OF THE UNITED STATES.

Soule, Master of Oregon v. Rodocanachi et al.—The Bark Oregon.

I therefore pronounce for the damages in this case to be ascertained by a reference to R. M. Lusher esq., Commissioner in Admiralty.

NOTE.—This decree was affirmed on appeal to the Circuit Court, by Mr. Justice CAMPBELL.

CORNELIUS SOULE, Master of BARK OREGON v. RODOCANACHI & FRANGHIADI; and RODOCANACHI & FRANGHIADI v. THE BARK OREGON.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. McCALDER, JUDGE.

The first libel is for freight.

The second libel for damages to cargo.

1. Where a cargo is received on board a ship in good order, and on delivery it is found in bad order, the *onus probandi* is upon the master of the vessel to show it was not through his fault or negligence the injury was sustained.
2. The case presented by the pleadings in a cause is the only one to which testimony can be directed, and the only one upon which the court can be called to adjudicate.
3. In a case of damage to cargo where the libel alleges the fault of the master to be, 1st. That he falsely represented his vessel to be tight, staunch and seaworthy; and 2d. That the danger resulted from the master's carelessness, negligence and improper conduct; the libellant cannot claim another specific ground of complaint not set up in the libel, as that the danger was caused by the fault of the master in not putting into some other port to repair his vessel and take measures to preserve his cargo.
5. In view of all the facts within his knowledge the master of a vessel will be justified, if in the exercise of a sound discretion he pursues the course he deemed most expedient for the benefit of all concerned.

Durant & Horner, for master of Oregon.

P. E. Bonford, for the shippers.

Soala, Master of Oregon v. Rodocanachi et al.—The Bark Oregon.

McCALEB, J.—Some time in the month of October, 1854, the master of the bark Oregon, being then in the harbor of Rio de Janeiro, entered into a contract for freighting and chartering his vessel, with the shippers Rodocanachi & Franghiadi, by which he agreed to transport for a consideration stipulated in the charter party, a cargo of coffee from Rio de Janeiro to this port. The coffee was delivered in bad order, which the master of the Oregon contended was the result of the tempestuous weather he encountered on the voyage. The freight stipulated to be paid under the charter party, was refused by the shippers, upon the ground that the damage sustained by the coffee resulted from the fault of the master and the fact that the vessel was unseaworthy. The libel for freight was filed by the master on the 19th of March, 1855, against the shippers, who on their part filed their libel on the 24th of the same month, against the vessel, claiming damages for loss arising from the injury sustained by the coffee on the voyage.

These cases have been, by consent of the proctors engaged, consolidated. The law and evidence by which the court must be guided in its judgment, are equally applicable to both.

The master of the bark Oregon, as part owner and as agent of the said bark, alleges in his libel that some time in the month of October last, that vessel being then in the port of Rio de Janeiro, he (the libelant) made and concluded a charter party, by which in consideration of the covenants and agreements therein set forth to be performed by the respondents, he did covenant and agree on the freighting and chartering of the said bark to the respondents for a voyage from the port of Rio de Janeiro to the port of New Orleans, on the terms set forth in the charter party.

In pursuance of the provisions of this charter party, the respondents shipped on board of the bark 7,145 bags of coffee to be transported to the port of New Orleans. The bill of lading shows that the coffee was received on board in good order, and the master of the bark binds himself to deliver the same in like good order and condition at the port of New Orleans.

The coffee arrived at this port in a damaged condition. About 5,000 bags were musty and much injured, and about 800 bags

were thrown away as valueless. There were 2,731 bags which were pronounced good. Only a very small portion of these were affected by the salt water. The witnesses bear unequivocal testimony to the effect that it was the worst damaged cargo of coffee, which has to their knowledge arrived at this port from Rio de Janeiro. It is quite unnecessary to comment at length upon this testimony, inasmuch as the material fact to which it relates is admitted by both parties.

There are other facts which are fully established, and which it will be only necessary to refer to. The most important of these are: First, That the bark upon which this cargo was shipped was a tight, staunch, well equipped and in all respects seaworthy vessel when she received the cargo in the harbor of Rio de Janeiro: that a preference was given to her over all other American vessels then there waiting freight, and that she obtained a higher rate than was allowed to other vessels of her class, in consequence of her acknowledged superiority.

The defence set up to the claim of the shippers for damages is, that the delivery of the cargo in a damaged state was the result of the injury sustained from the perils of the sea; and the evidence leaves no doubt upon my mind that the stormy weather encountered by the bark has not been exaggerated even by the protest. The facts set forth in that protest are substantially proved by the log-book and the depositions of the mate and seamen who were on board the vessel. The particular dates mentioned in the protest were, it is true, not remembered by the seamen; but they testify to the correctness of the general statement of facts therein set forth. The mate certifies that when the bark first left Rio she encountered very heavy weather; the sea ran heavy at the time. "We shortened sail," says he, "as fast as we could until we got under a close-reefed maintopsail. At the same time the vessel shifted her cargo over on to her beam ends, the ship laying over on one side unmanageable. Her yard arms were in the water a part of the time and part out. We went below with all the men and shifted the cargo so as to right her. We then came upon deck and got the bark round on another tack. She was on her beam ends about three hours. This caused her to make water and strain very heavily. On trying

Soule, Master of Oregon v. Rolocanachi et al.—The Bark Oregon.

the pumps we found that she had made eighteen inches water. It also stove in two or three casks of fresh water on deck. Everything was floating on deck at the same time. The coffee was damaged: all the water in the hold of the vessel, instead of being in the bottom, was on one side of the ship—the lee side. When by shifting the cargo, the bark was got off her beam ends, the water went over on to the other side and damaged the cargo there." The witness thinks the water may have penetrated one or two tiers on the starboard side. On the lee side it must have caused damage to three or four tiers. The weather became more moderate. There were two other slight gales, but not so heavy as the first. The cargo was again shifted, and the crew went below and trimmed it over to the other side to bring the ship upright. The ship was laboring very heavily, and there was a very heavy sea. The pumps were kept constantly going. On the 9th of January the main staysail and the fore-topmast staysail were lost. The greatest leak the vessel had during the voyage was that causing 400 strokes an hour—eleven inches an hour. The least she made in fine weather was four or five inches in four hours. In fine weather the pumps were worked every half hour; in rough weather constantly.

The principle of law which throws the *onus probandi* upon the master to show that it was not through his fault or negligence that the injury was sustained, has called forth all the facts upon which the court is required in this case to adjudicate upon the rights of the parties. These facts most satisfactorily establish the causes of the injury. The previous good condition of the vessel and the care with which the cargo was placed on board, leave room for no other conclusion than that the damage to the cargo was caused by the tempestuous weather which the bark was compelled to encounter. The effect of salt water and heat in the hold of a vessel on a cargo of coffee, is too well established to admit of a doubt.

But on behalf of the shippers it is contended that the master failed in the discharge of his whole duty in not either putting back to the harbor of Rio, or running into some other harbor along the coast of South America, and there having his vessel refitted and the cargo removed and dried.

This is the important point in the cause, or rather the point to which the argument of the proctors for the shippers was particularly directed. Much difficulty may be saved, however, by looking attentively to the pleadings. The case as presented by the pleadings is doubtless the only one to which the evidence has been directed, and the only one upon which the court can be called upon to decide. By a reference to the libel filed on behalf of the shippers, it will be seen that the failure on the part of the master to turn back to Rio or to run into a port of necessity on the coast of South America, is not made a specific ground of complaint; nor is there any allegation which would lead the court to presume that the refusal to satisfy the freight in this instance arose from any such omission on the part of the master. The libel referred to, clearly places the fault of the master upon the grounds: First, that he falsely represented his vessel to be tight, staunch and strong and every way suited for the transportation of the cargo; and secondly, that the damage resulted from the carelessness, negligence and improper conduct of the master, his mariners and servants.

The evidence adduced on the part of the master has, as we have already seen, very satisfactorily shown that the representations of the master in reference to the seaworthiness of his vessel, were justified by her real condition and the preference shown for her by the shippers; and there is nothing in the testimony to prove either carelessness, negligence or improper conduct on the part of either the master or the crew. On the contrary, I conclude from the evidence of those on board, that the vessel was managed with all due care and skill, and that everything that could be done was performed by the master and those under his orders to prevent any further injury than that which was sustained in consequence of the vessel being thrown upon her beam ends and being otherwise strained from the violence of the wind and the waves.

The proctor for the shippers has relied upon the authority of *Flanders on Shipping*, § 270, to support the principle, that if damage be done by a peril insured against or within the exceptions of the bill of lading, but the master neglects to repair that damage, and in consequence of the want of such repairs the ves-

sel is lost, or the goods injured or destroyed, the neglect to make repairs, and not the sea damage, is treated as the proximate cause of the loss. In such a case, it is contended, that the insurers are discharged, but the carrier is liable to the shippers, and upon the ground of his neglect to make the requisite repairs. But we have seen that there is nothing in the pleadings which involves this principle; and if there were, there is nothing in the evidence which shows that the master of the bark was aware of any such want of repairs as would have rendered it proper or expedient on his part, in the exercise of a sound discretion, to put back to Rio Janeiro, or to go into any other port. Are we at liberty to say that he knew immediately after the first tempestuous weather, to which his vessel was exposed, that she was so badly injured as to render probable the loss of the cargo of coffee on board? While the evidence is full to the effect that a great deal of bad weather was experienced, and that thereby the vessel made water both on her sides and about her rudder casing, there is nothing to show that any great injury had been sustained by the vessel herself. The evidence, on the contrary, shows that all the necessary repairs were made on her in this port for the sum of \$95 for caulking, and \$ for repairing the rudder casing.

It is impossible to say, in view of the facts which have been adduced in evidence, that the master was bound to know the extent of the damage which the cargo had sustained. The latest gales were experienced in the month of January, and it must have been, therefore, near the close of the voyage that the full extent of the injury was sustained. The injury to the rudder casing of the vessel was only ascertained by an examination in this port. It is fair to presume that the master, in the exercise of a sound discretion, pursued the course which under all the circumstances was deemed most expedient, to promote the interests of all concerned. In view of the amount of damage actually ascertained, it is easy to say what might have been done to avoid it. But as it is now impossible for us to place ourselves in a position to appreciate all the difficulties encountered by the master, all our speculations upon the propriety of his conduct, must necessarily prove unsatisfactory.

"The contract of the ship owner," says Mr. Justice STORY in

510 DISTRICT COURT OF THE UNITED STATES.

Steamboat Bella Donna and Schooner Louisa.

the case of *Jordan et al. v. The Warren Insurance Company*, 1 Story, 354, "is to carry the cargo to the port of destination; but he by no means warrants the state in which it shall arrive, as it may be affected by the perils of the seas or other perils, against which his contract does not bind him. It is no answer to say, that if the cargo is carried on in a damaged state, it will be ruined. The true reply is that the ship owner has nothing to do with that; and that the shippers have no right to throw the loss of freight upon him, because the cargo is in danger of ruin by a calamity against which he did not warrant them."

After a full and attentive consideration of this case, I am of opinion that the master is entitled to the freight, and that a decree must be entered in accordance with the prayer of his libel. It is further decreed that the claim for damages be dismissed, with costs.

WM. J. PORTEVANT, Libellant v. THE STEAMBOAT BELLA DONNA, Respondent, and the Owners of SCHOONER LOUISA, Libellants v. THE STEAMBOAT BELLA DONNA.

District Court of the United States. Eastern District of Louisiana.
In Admiralty.

HON. THEO. H. MCCAULEY, JUDGE.

1. Where it appears that a steamboat was moored at the bank of the river in her proper place and out of the track of vessels ascending and descending the stream, and she is injured by a collision with one of two boats ascending, her owner is entitled to damages; and the only question for the decision of the court is, from which of the boats is he entitled to recover?
2. Where two steamboats are ascending the river side by side, and a collision occurs, a very clear case should be made out to justify the court in giving judgment against the boat running next to the shore, when it is shown that she was as near thereto as prudence would dictate.
3. In such a case the outer boat having the whole width of the river for a channel, must show beyond a reasonable doubt that, as the swifter boat of the two, she took all proper precautions to pass the other at a suitable distance; otherwise she will be responsible for the damage arising from a collision with a steamboat moored at the shore.

Mr. Van Matrie, proctor for libellant.

Wolfe & Singleton, proctors for the *Bella Donna*.

J. W. Price, proctor for the *Louisa*.

McCALEB, J.—The libellant in this case claims damages for injuries sustained by his steamboat called the *Ruby*, in a collision with the *Bella Donna* on the 18th November last. The owners of the latter boat on the other hand, alleged, that the collision was caused by the steamboat *Louisa*, which was ascending the river with the *Bella Donna* at the time of the occurrence.

No possible blame can be imputed to the *Ruby*, which, at the time of the collision, was moored at the bank of the river between Sixth and Seventh streets in the fourth district of this city. She was in a proper place, out of the track of vessels ascending and descending the river. Her owner is undoubtedly entitled to indemnity for the damages he has sustained, and the only question for the decision of the court is whether he shall have a decree against the *Bella Donna* or the *Louisa*.

These boats were ascending the river on their usual voyages, having previously left their places at the wharf about the same time—the *Louisa* a few minutes before the *Bella Donna*. The latter, however, being superior in speed, very soon overtook the former and passed her on her larboard. Before she passed her entirely, however, her starboard quarter, ten feet from her rudder, came in contact with the larboard side of the bow of the *Louisa*. The force of the collision had the effect of throwing the bows of both boats in towards the shore. The *Louisa* was thrown with considerable violence against the ship *Garrick*, at that time moored at the shore, and the *Bella Donna* was driven against the *Ruby*. I am satisfied, that the *Louisa* did not run against the *Ruby* at all, although there is testimony to that effect. If she did, it is certain that she caused no injury, inasmuch as the whole force of her speed was broken by her coming in contact with the anchor chains of the *Garrick*.

My first impression was that the *Bella Donna* and the *Louisa* were engaged in a race at the time the collision occurred; but

512 DISTRICT COURT OF THE UNITED STATES.

Steamboat Bella Donna and Schooner Louisa.

further examination of the evidence, has led me to a different conclusion. The testimony of the witnesses is my only guide; and where that concurs, the court can have no hesitation in following it. Upon this point all the witnesses agree that they were running at their usual speed. In reference to other facts, however, it is not so easy to arrive at a satisfactory conclusion, by reason of the usual conflict of evidence. The witnesses Dennett and Mure, should undoubtedly be regarded as entitled to full credit; but I am satisfied they were not in a position to notice with accuracy all that occurred in the management of the two boats; we find in the first place, that Dennett was mistaken in a most essential particular. He testifies that the Louisa ran into the Ruby, and he is most clearly shown to be in error, both by the testimony of the pilot of the Louisa, and of the man who had charge of the Ruby, and was on board of her at the time of the collision. In the next place, he could not see the changes in the course of the boats; it should be borne in mind, that the Louisa was running next to the shore, and it was her duty to keep at a safe distance from the shipping along the left bank of the river. The evidence shows that she was as near as prudence would dictate. The Bella Donna passed her on the outside, and had the whole width of the river for a channel; she was evidently the stronger, larger and speedier boat of the two, and could easily have gained the position in the river for which she was evidently striving, after she had gone ahead; in passing the Louisa, I am satisfied that she did not run at a sufficient distance from the latter, and that in attempting to regain her position near the shore or the shipping, she was guilty of imprudence and want of skill in steering too soon and too suddenly across the bow of the Louisa.

The testimony of the passenger on board the Louisa has mainly brought my mind to this conclusion. He was evidently in a most favorable position to watch the movements of the two boats, and seems to be a man of experience.

In my judgment, a very clear case should be made out to justify a court in giving judgment against the boat running next to the shore, when it is clearly shown, as in this instance, that she was as near thereto as prudence would dictate. It is the duty of

the *Bella Donna* to show beyond a reasonable doubt, that as the stronger and swifter boat, she took all needful and necessary precautions in passing the other boat. When it is so perfectly apparent, that, from her superior capacity to stem the current of the river, she could easily have taken the lead of the *Louisa*, it should be clearly shown, that she was prevented from accomplishing her object, by some overruling necessity, or by some manifest violation of the rules of navigation, on the part of the other boat. The proof, in my judgment, is not sufficient to exculpate her from blame. On the contrary, I think she is justly chargeable with the damages sustained by the *Ruby* and the *Louisa*, notwithstanding the positive but most unsatisfactory testimony of Dennett. It is quite impossible that from his position on shore, while the two boats were nearly opposite to where he was standing, he could discern with any degree of accuracy, the deviations in the course of either boat. The "wild steering" alluded to by the witness Mure, may be accounted for by the fact spoken of by the pilot of the *Louisa*, that it became necessary to deviate from her course at one time, to avoid a scow. As a general rule, I am not disposed to rely upon the testimony of pilots who may be called to testify in justification of their own conduct; but in this instance I find the testimony of the pilot of the *Louisa* so far sustained by that of the passenger before referred to, as to entitle it to full credit.

I therefore pronounce for the damages in this case, and decree that the libellant recover the amount thereof from the *Bella Donna* as the guilty boat. I also decree that the owners of the *Louisa* recover the amount actually expended in repairing the injuries sustained by their boat in consequence of the collision. And I now order that the case be referred to the commissioner, R. M. Lasher, Esq., to ascertain the amount of damage.

514 DISTRICT COURT OF THE UNITED STATES.

The Brig Atlantic.

R. L. MAITLAND *et al.*, Libelants v. THE BRIG ATLANTIC,
Respondent.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. MCCALED, JUDGE.

1. Where A, the master of a brig, puts into a foreign port by reason of a leak, and there borrows money from B., and draws a bill of exchange upon C, which bill is unpaid at maturity, and at the same time that the bill is drawn, he also executes a mortgage or hypothecation, in which there is a special stipulation that B. is not to take the usual marine risks in cases of bottomry and hypothecation, neither instrument establishes a lien upon the brig, which can be enforced in the admiralty, for want of jurisdiction.
2. The essential difference between a bottomry bond and a simple loan is, that on the latter, the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel.
3. Admiralty cannot enforce a claim for money which has been advanced on the personal credit of the vessel, owner or master, in a suit *in rem*.
4. Where a bill is drawn, and a bottomry bond taken for the same sum, the bill must share the fate of the bond.

Mr. Semmes, proctor for libelants.

Mr. Gaither, proctor for respondents.

MCCALED, J.—The libel in this case alleges that prior to the 12th of December, 1853, the brig Atlantic, while on a voyage from Philadelphia to New Orleans, with a cargo of coal, sprung a leak, and went into the port of Key West for repairs, to enable her to complete her voyage. That the master, Henry C. King, being a stranger in Key West, and being in want of money to pay for the necessary repairs, and having no other means of procuring the same, borrowed of the commercial firm of H. H. Wall & Co., at Key West, the sum of eight hundred and thirteen dollars and twenty-one cents, upon the hypothecation and mortgage of the brig, her cargo and freight.

The Brig Atlantic.

It is further alleged that, in consideration of the said advance, the master drew his draft or bill of exchange for the sum of eight hundred and sixty-two dollars, which sum included the loan for repairs, and six per cent. thereon for interest and commission. The draft was drawn upon Henry Simpson & Co., of Philadelphia, payable one day after sight; and in order to secure the payment thereof, the master by a certain instrument of writing, dated 12th December, 1853, and executed before a notary public at Key West, hypothecated and mortgaged the brig, her cargo, freight, apparel and furniture, unto the said Wall & Co. The draft was duly assigned by Wall & Co. to the libelants, who, after due diligence, not being able to find the drawees, caused it to be protested for non-acceptance and non-payment, and gave notice thereof to the drawer. This action is now instituted to hold the brig liable for the payment of the amount of the draft. Both the draft and instrument of hypothecation and mortgage are annexed to the libel as part thereof. The latter, after the usual terms of hypothecation and pledge, concludes with the following stipulation: "It is expressly understood and agreed, that the said Wall & Co. do not take upon themselves the marine risks usual in cases of bottomry and hypothecation."

To the libel an exception had been filed by the claimants, to the effect that this court, as a court of admiralty, has no jurisdiction to enforce the payment of the sum demanded.

It is evident that an extravagant rate of interest has been exacted by the house of Wall & Co., and it is this fact, coupled with the stipulation in the instrument of hypothecation, to which reference has just been made, which forms the basis of this exception. Although the lender of the money seems to have intended to secure the payment of the draft, by exacting both a mortgage on the ship, and a pledge of the merchandise laden on board also, the instrument cannot be properly regarded either as a bottomry bond or as a security in the nature of respondentia. That the master had a right, in this instance, in a port of a state other than that of the residence of the owner, to raise money for the payment of the necessary repairs done upon the brig, by pledging the ship, cannot be denied. And if the court could regard the instrument before it in the light of a bottomry bond,

with the usual stipulations, it would feel itself compelled to exercise jurisdiction to grant the party relief. There would be a clear and well established lien upon the vessel, which, according to the principles of the maritime law, could be enforced in the admiralty.

Contracts of bottomry are so called, because the bottom or keel of the vessel is figuratively used to express the whole body thereof; sometimes, also, but inaccurately, money lent in this manner is said to run at respondentia—for that word properly applies to the loan of money upon merchandise laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port. In like manner, the repayment of money lent on bottomry does in general depend upon the prosperous conclusion of the voyage; and as the lender sustains the hazard of the voyage, he receives, upon its happy termination, a greater price or premium for his money than the rate of interest allowed by law in ordinary cases. The premium paid on these occasions depends wholly on the contract of the parties, and consequently varies according to the nature of the adventure. Abbott on Shipping, 150, 151. The high rate of interest exacted by the lenders in this case, would, therefore, be no valid objection to the libelants' recovery, if it appeared from the act of hypothecation that the usual maritime risks had been incurred; but, so far from this being the case, the clause in the act of hypothecation, to which reference has been made, expressly declares that no such risk was to be assumed. The essential difference between a bottomry bond and a simple loan is, that in the latter the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel. And if the lender of money on a bottomry or respondentia bond be willing to stake the money upon the safe arrival of the ship or cargo, and to take upon himself, like an insurer, the risk of sea perils, it is lawful, reasonable and just, that he should be authorized to demand and receive an extraordinary interest, to be agreed on, and which the lender shall deem commensurate to the hazard he runs. But a bond executed as an hypothecation, but not upon the principles

The Brig Atlantic.

which govern such securities, is not a bottomry bond, capable of being enforced in a court of admiralty, but must be proceeded as at common law. It is absolutely necessary that the liability of the lender to the sea risks should appear or be fairly collected from the instrument; otherwise, the reservation of maritime interest will render the security void on the ground of usury, not only as a charge upon the ship, but also against the person of the borrower. And where an instrument, called a bottomry bond, contained an express clause that the sum secured should be paid within thirty days after intelligence of the loss, Lord STOWELL doubted his jurisdiction to entertain the suit at all, and dismissed it on the ground that the very essence of bottomry, which alone could give jurisdiction to the admiralty, was wanting. From this sentence an appeal was prosecuted to the Delegates, and that court, after directing a search for precedents, decided that as the maritime interest was reserved, and maritime risk was excluded from the bond, it was void. 1 Hagg. 55; 2 Hagg. 57.

It is contended by the proctor for the libelants, that the hypothecation in this case, though bad in part, may, by a court of admiralty, be regarded as good in part, and as such, still be considered as a legitimate contract for the exercise of its jurisdiction. If, by assuming this position, the proctor would maintain that the clause in the hypothecation by which the libelants refused to assume maritime risks, may be rejected by the court, and the instrument be enforced as a valid hypothecation independently of this clause, he is widely mistaken. As the parties have chosen to bind themselves, so shall they be bound, and the court has no authority whatever to vary the stipulations of their contract, simply for the purpose of administering equitable relief, as a court of admiralty. It is perfectly true that a bottomry bond may be bad in part and good in part, and that as to the good, it is competent for a court of admiralty to exercise jurisdiction to grant relief. But I apprehend that this well recognized principle was never applied to a case like the present. It has sometimes happened that advances have been made for repairs in foreign ports, partly upon the personal credit of the owners, and partly upon the credit or security of the ship; and the whole amount of advances so made, has been included in one bottomry

bond. In such cases, it has been uniformly held that as to the particular sum advanced on the personal credit of the owners, the bond was bad ; but as to the sum advanced on the security of the vessel, it was good, and that as to the latter amount, a court of admiralty would exercise jurisdiction to enforce its payment. Such was the principle recognized by Lord STOWELL in the case of *The Augusta*, 1 Dodson, 287. "It is quite clear," said the court, "that the bill of exchange was founded on considerations of personal responsibility only, and that a bond of hypothecation was not at that time in the contemplation either of the borrower or lender. I have therefore no hesitation in saying that with respect to the £600, the bond is not effective; but with respect to the other part of the money, I am of a different opinion. For it is evident that no other security was held out than the ship and the freight, and it is therefore so far indisputably, a bottomry transaction. The foreign merchant, it is true, wished to extend the same species of security to the whole of his debt, and I see nothing dishonest or dishonorable in his attempt to do so; but, at the same time, this court cannot lend its assistance by enforcing the bond beyond the extent of its legal validity. It cannot permit the party to say the master had no other resource for procuring supplies except bottomry, when he himself had been content to advance the money on the personal responsibility of the owner. As far, then as it relates to the £600, I think the bond is invalid; but for the rest, I think it ought to be enforced. It is not necessary here, that a bond should be either good or bad, *in toto*: in the equitable proceedings of this court, it may be good in part and bad in part." The case of *The Hero*, 2 Dodson, and that of *The Hunter*, Ware's Rep. 254, will be found to correspond with the one just cited, and the decisions of the courts are in strict conformity with the rules here laid down. It is true that in the case of *The Hunter*, Judge WARE held that although there was a fatal objection to the instrument as a bond securing marine interest, it was not perhaps quite certain that the creditor could have no remedy upon it in a court of admiralty for the principal sum advanced, with land interest. In that case an amendment to the libel was allowed, and upon a new allegation that the libellant had a right to be paid upon

general principles of the maritime law, the amount which it was shown had been originally advanced upon the personal credit of the owner, was decreed to be paid with land interest only.

Without undertaking to question the correctness of the course adopted by the learned judge of the District Court of Maine, in giving a remedy *in rem* for a sum which he previously declared had been advanced upon the personal credit of the owners, it will be sufficient to show that the case now under consideration differs materially from that in which the amendment was allowed. In the latter case, there was the usual assumption of maritime risks, whereas the libelants here, as we have already seen, expressly refused to take any such risks. The claim of the lenders should have been made to depend upon the safe arrival of the vessel. This was necessary to justify the court in granting them now a remedy *in rem*. It is perfectly true, as the proctor contends, that the very fact that advances had been made to defray the expenses of repairs, would create a lien upon the vessel, if such advances had been made upon the credit of the vessel, and that such a lien would exist if there were no special act of hypothecation or mortgage. It would indeed exist by operation of law. But if instead of relying upon the general principles of the maritime law, the lender of the money chooses to exact of the master a special hypothecation of the vessel and cargo, and causes to be inserted in the instrument, clauses which operate as a waiver of his lien, or as a forfeiture of his right to proceed *in rem*, how can a court of admiralty grant him relief? If, as in the case now under consideration, he exacts *maritime* interest upon his loan, and at the same time expressly refused to assume *maritime risks*, is it not clear that the very instrument upon which he relies for his security is, by the well recognized principles of the maritime law, an abandonment of all claim against the vessel? It is well settled that if a material man gives personal credit, even in the case of materials furnished to a foreign ship, he loses his lien so far as to exclude him from a suit *in rem*. 4 Wash. 453. This rule is doubtless subject to the qualification that an express contract for a stipulated sum is not of itself a waiver of the lien, unless the contract contains some stipulations inconsistent with the continuance of the lien. 7 Peters, 324.

The drawing of the bill of exchange does not, in my judgment, help the case of the libelants. In the case of *The Augusta*, already referred to, Lord STOWELL considered that the taking of a bill of exchange by the holder of a bottomry bond, was a strong circumstance to show that the advances were made on the personal credit of the owners, and not on the credit of the vessel, and he held the bond void for the amount of the bill, and good for the advances made after the bill was drawn. It is, however, the usual practice to draw bills of exchange; and there is no inconsistency in taking this collateral security, nor has it ever been held to exclude the bond, nor diminish its solidity. So it was distinctly held in the case of *The Jane*, 1 Dodson, 466. But it is well settled, that when a bill is drawn, and a bottomry bond taken, with maritime interest, for the same sum, the bill must share the fate of the bond. Until the vessel arrives in safety at the end of the voyage, the loan is at the risk of the lender, and if she is lost, nothing is due upon the bill more than upon the bond. When a bill is therefore drawn, and a bottomry bond given for the same consideration, the owner is not bound to honor the bill; at least not before the safe arrival of the vessel and the end of the risk. For it does not appear that anything will ever be due until the happening of the event on which the bond becomes payable, and then the payment of one security extinguishes both. Ware's Rep. 252.

It is further contended by the proctor of the libelants, that it is altogether premature, upon a trial of this exception to the jurisdiction, to regard the interest charged by the lender as usurious; that it is competent for the party upon the trial of the case upon its merits, to show that under the charge of *interest and commission*, there is no usury; that the interest is one thing and the commission another, and that there is nothing to prevent the court from considering the one as separate and distinct from the other. When the question of jurisdiction was first presented to the consideration of the court, I certainly did not understand the proctor to deny that maritime interest had been charged in the bill of exchange and the instrument of hypothecation, and I cannot upon an examination of that instrument, resist the con-

elusion that usury lurks under this apparently harmless name of *commission*.

The aggregate amount borrowed by the master was \$813. This was loaned at the rate of what is specifically denominated six per cent. *commission*, and the advance and commission amount to \$862. For this, a draft is drawn, payable one day after sight, on the owner, residing in the city of Philadelphia. Here, then, is the sum of \$49 commission, charged upon a loan of \$813 for the space of perhaps ten days—allowing this time for the bill to be sent to the residence of the owner, from Key West. To use the expressive language of Lord STOWELL, in the case of *The Gratitude*, 3 Rob. Adm. R. 277, "I know that the word *commission* sounds sweet in a merchant's ear; but whether it is a proper charge or not on this occasion, I will not take upon myself to determine without a reference to the registrar properly assisted." I entertain but little doubt that maritime interest has been stipulated to be paid, and I have as little doubt that it is fully within my power, sitting in a court of admiralty, to reduce the rate of interest, where it is manifestly exorbitant, that is to say, in a case coming within my jurisdiction. The power possessed will, however, be exercised with great care and caution. *The Zodiac*, 1 Hagg. 326.

But I do not pretend to assert the doctrine, that to justify this court, as a court of admiralty, to exercise jurisdiction over a bottomry transaction, it is indispensably necessary that maritime interest should be charged. This would, in my judgment, be altogether unreasonable. The lender of money on a bottomry bond certainly has a right to relinquish a portion of the profits he would be entitled to realize; and the owner of a vessel would come with a bad grace to contest the validity of a bottomry security, upon the ground that the lender of the money had charged the master less than he was authorized to exact under the maritime law.

Conceding then, that in the case before us, maritime interest was not demanded, and that the charges under the name of *commissions* will not amount to usury, can this court, as a court of admiralty, exercise jurisdiction of the case, when it is perfectly apparent that no maritime risks were incurred? I am

522 DISTRICT COURT OF THE UNITED STATES.

Steamboat Edward Howard.

clearly of opinion that it cannot. In the language of Sir STEPHEN LUSHINGTON, in the case of *The Emancipation*, 1 W. Rob. 128, "I must look to the bond itself, without referring to extrinsic evidence at all; and unless I can come to the conclusion, from the words of the bond, that any maritime risk is to be directly or indirectly inferred, I must hold that I have no authority to pronounce in favor of its validity." Again, that eminent civilian says, in the same opinion: "I am perfectly satisfied that whatever might have been the intention of the contracting parties to the bond, both upon the face of the bond itself, and according to legal inference, the payment of the money advanced does not depend upon the safe arrival of the ship. I must, therefore, pronounce against the bond."

Upon mature consideration, therefore, I am of opinion that, as the pleadings now stand, I have no jurisdiction of the case, and that the libel must be dismissed, with costs.

WILLIAM HESSIAN *et al.*, Libelants *v.* THE STEAMBOAT EDWARD HOWARD, Respondent.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

THEO. H. MCCALED, JUDGE.

1. It is the duty of salvors in bringing suit for salvage, to make all the co-salvors parties, otherwise the court cannot do full justice to all concerned.
2. Where a few of the salvors present themselves in court, conceal from the court the names of others, who equally participated in the salvage services, the court would feel bound to dismiss their libel.
3. Where a fair and liberal allowance as salvage is tendered to the libelants or their proctors, the court will be bound to decree costs against the libelants, to be paid out of their distributive share.

Mr. Egan, proctor for libelants.

Mr. Hunter, for respondent.

McCALEB, J.—The proceedings in this case are irregular. The libelants are seven of the crew of the steamboat Iroquois, which went to the aid of the Howard while she was on fire near President's Island, in the Mississippi river. They set forth their meritorious services in saving the burning boat and cargo; and if the allegations of their libel could be taken as true, they alone were engaged in the salvage service; they alone were instrumental in saving the boat and cargo from impending peril. The difficulty and confusion which a libel like this will necessarily create in cases of this nature, are apparent. It is impossible for the court to do justice to all parties concerned, when the few who present themselves, conceal from it the names of others, who equally participated in the salvage service, and are therefore equally entitled to share in the compensation which the law allows. It is the duty of salvors, in bringing suit for salvage compensation, to make all the co-salvors parties. This they are required to do at least in general terms, to enable the court in one final decree to do full justice to all concerned. Another and most important reason for the strict enforcement of this rule, is to be found in the necessity of avoiding a multiplicity of suits. I have no hesitation, therefore, in saying that if I were to confine myself to this case as it now stands before the court, I should feel bound to dismiss the libel. The proctors for the respondent, however, have brought to the knowledge of the court, the fact, that the insurance company to which the boat and cargo saved have been abandoned, have amicably agreed to pay to the salvors a fair and reasonable compensation for their services. An arrangement has already been effected with the master of the Iroquois, by which this compensation can be distributed among the officers and crew of that boat. Whatever may be done hereafter to meet the wishes and expectations of the other salvors, it is in evidence that a proposition was made to the proctor of the libelants in this case, to pay them what was deemed a fair and liberal proportion of the compensation thus awarded by the insurance company. The quantum of the whole compensation has been allowed upon the principles of the case of the James Robb and T. P. Leathers, decided by this court. The facts and circumstances as detailed by the evidence in that case, would render

Steamboat Edward Howard.

the decree of the court, a fair criterion for its action in the one now under consideration. The two cases are strikingly similar, and certainly I have heard no evidence adduced on behalf of the present libelants, which would induce me, if all the salvors were now before the court, to award them a higher compensation than was allowed in the case of the Robb and Leathers.

The respondent has, through its proctors, offered to deposit in court for the benefit of the libelants, a fair proportion of the whole compensation allowed. It is for this court to say what that proportion should be. Without proceeding to make a distribution by shares, which cannot be properly effected in the absence of evidence showing the whole number of salvors and the various positions they occupied on board the Iroquois, I am satisfied that the amount which was tendered to the proctor of the libelants, would be a fair and liberal compensation for at least a portion of his clients: for according to the evidence, a distinction should be drawn between those who shipped at New Orleans and those who shipped at Memphis. The former were among the first who went to the assistance of the Howard, and the latter embarked in the salvage service after much had already been done for the rescue of the boat and cargo from impending peril. To the former I shall award the sum of \$50 each, and to the latter \$30 each; the costs to be borne by them all, according to the rate of compensation here allowed. It is with reluctance that I require of salvors the payment of costs; but as the case now stands before the court, no other judgment can be properly given. The court cannot be responsible for irregularities committed in the institution of suits of this nature, which, like suits in equity, should embrace all as parties, who are interested in the final decree.

The amount agreed upon as a salvage compensation between the master of the Iroquois and the underwriters, is \$10,000. This has been paid over to R. Yeatman & Co., agents of the boat. If the amount be divided between the owners of the Iroquois and the salvors equally, according to the decree of this court in the case of the Leathers, there will remain \$5,000 to be divided among the crew of the Iroquois. Three fourths of the whole property saved was secured, it is said, before the boat

The Ship Norman.

went to Memphis and discharged her upward cargo. She there took on board some additional hands, among whom were four of the present libelants. There were, it appears, about sixty people in all on board of the Iroquois, and of these forty-four or forty-five were firemen or deck hands. The libelants in this case were all firemen. The sum of \$50 each awarded to the three who were shipped in New Orleans, and the \$30 to each of those four who were shipped at Memphis (in all \$270), will give the libelants, even after paying the costs, more than can be paid to the others of the crew according to the rule of apportionment already established. In cases like the present, a very large proportion of the salvage compensation must necessarily be awarded to the salving boat, inasmuch as it was mainly through the admirable equipments—the apparatus of such boats as the Robb and the Iroquois, that the exertions of the salvors were rendered effectual.

The decree will be entered and the amount herein awarded will be paid over by the clerk out of the sum deposited in the registry of the court. No proctor's fees to be deducted from the amount so deposited.

ROBERT KERR *et al.*, Libelants *v.* THE SHIP NORMAN, Respondent.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. MCALEER, JUDGE.

1. Where it was shown by the bill of lading and the testimony of the shippers that a cargo of coffee was in good order when it left the port of Boston, and it was proven to be in a damaged state when it reached the consignees in New Orleans, the necessary conclusion must be that the damage was caused while it was on board the ship.
2. The coffee having been reshipped in its damaged state to the owners in St. Louis and subjected to an examination there, the report of the witnesses who made that

The Ship Norman.

examination may be relied on in ascertaining the extent of the damage in the quality of the coffee, when it arrived at its ultimate destination; and it may also serve as a fair criterion in fixing the amount of damage it had sustained when it was received at this port.

L. Hunton, proctor for libelants.

Wolfe & Singleton, proctors for respondent.

MCCALEB, J.—On the 5th of January, 1854, Clarke, Jones & Co. of Boston, shipped from that port on board the ship Norman, for and on account of the libelants, 200 bags of coffee, and consigned the same to Kennett, Dix & Co. of this city, by whom they were forwarded to the libelants in St. Louis. The bill of lading is in evidence and shows that the coffee was shipped at Boston in good order and condition; and this is fully corroborated by the testimony of those who had charge of the shipment and who were examined under a commission. The evidence given by Clarke, seems to me so clear and satisfactory, as to the good condition of the coffee at the time of shipment, that I cannot doubt that the terms of the bill of lading present a true statement, of not only the external appearance of the sacks, but also of the actual condition of the coffee when it left the hands of the shippers. The parties from whom the coffee was purchased by Clarke, Jones & Co. for the libelants, also show, that it was *in perfect order* when they delivered it. The conclusion is, therefore, irresistible that the damage sustained by the coffee, was caused after it left the hands of the shippers and while it was under the care and control of those who received it on board of the Norman, and brought it to this port.

In arriving at a satisfactory conclusion as to the amount of damage, the court has no guide except the testimony of the witnesses in this city and those who were examined under a commission in St. Louis. The testimony of the latter may be relied on in ascertaining the extent of the damage in the quality of the coffee when it arrived at its ultimate destination, and it must also serve as a fair criterion in determining the damage sustained when the coffee was received in this port. The causes of the damage were clearly, in my judgment, the result of the

The Ship *Norman*.

fault of those who had charge of the ship; and there is nothing in the evidence which creates the slightest presumption that any additional injury was sustained by the coffee during the few days necessarily required to transport it on board of a steamboat from this port to St. Louis. The original causes of the injury, may have, during those few days, increased the damage to some extent, but this would be too small to be taken into consideration, when the fault of the carrier between Boston and New Orleans has been so clearly established.

The depositions of Balle, Finnill and Christopher, surveyors and appraisers in St. Louis, assess the damages thus: 116 bags damaged 25 per cent., that is \$550, and 45 bags at 50 per cent., that is \$420. Making the aggregate of damage in *quality*, amount to \$970.

The evidence of damage in quantity is not by any means so satisfactory. The witness Haines testifies that at the time the coffee was received at the store of Kennett, Dix & Co., ten or twelve bags had burst, and they had lost one-fifth of the quantity. Wm. R. Clarke, the shipper at Boston, says there was 26,844 lbs. in the 200 bags; which would give, say 134 lbs. to each bag. Let us suppose, taking the smaller number mentioned by Haines, that there were ten bags burst and that each of these bags contained originally 134 lbs., 1,340.

On these there was a loss in quantity of 1-5	.	.	268
The coffee was worth in Boston 18 cents	.	.	13

\$34.84

Add this \$34.84 to the loss in quality	.	.	.	970.00
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\$1,004.84

For this sum, which I consider the amount of damage fairly deducible from the evidence, I shall order judgment to be entered in favor of libelants, with costs.

NOTE.—This case was taken by appeal to the Circuit Court of the United States, and the decree of the District Court affirmed by Justice CAMPBELL.—EDITOR.

528 DISTRICT COURT OF THE UNITED STATES.

Eames, Master of Ship Horatio v. Cavaroc & Co.

ITHACAR B. EAMES, Master of Ship Horatio v. CHARLES
CAVAROC & Co., Respondents.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. MCCALED, JUDGE.

1. There are two kinds of contracts passing under the general name of charter party, differing very widely from each other in their nature, their provisions, and in their legal effects. In one, the owner lets the use of the ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. In the other, the vessel herself is let to hire and the charterer takes her into his own possession, and has not only the use but the entire control of her. He becomes the owner during the term of the contract.
2. Where the general owner retains the possession and command of the ship, and contracts to carry the cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership.
3. Where the master complies with the stipulation in the charter party which requires the delivery of the cargo to the holders of the bills of lading as a condition precedent to his receiving the freight, he loses his lien on the cargo; and his recourse for compensation is against the consignees, as the representatives of the charterers.
4. Independently of the charter party the ship is bound for the merchandise, and the master is bound to transport and deliver the cargo according to the terms of the bills of lading, and is responsible for any damage the cargo may have sustained.
5. The stipulation in the charter party which imposes upon the consignees of the charterers, the duty of collecting the freight, makes it their duty necessarily to ascertain the reasons why payment is withheld by the holders of the bills of lading.
6. The general declarations of the owners of damaged goods, unaccompanied by any specific statements of disinterested persons, showing the nature and extent of the damage, are entirely insufficient and will be rejected by the court.

Durant & Hornor, proctors for libellant.

H. D. Ogden, proctor for respondents.

MCCALED, J.—The libellant sues upon a contract of affreightment by charter party to recover the amount of freight which is stipulated to be paid in the instrument. The charter party is

Eames, Master of Ship *Horatio* vs. Cavaroc & Co.

signed by the master of the ship *Horatio*, of the one part, and M. Depas and L. Meric, merchants of Bordeaux, of the other part, and is dated at Nantz on the 7th of March, 1853. The libellant binds himself to put his vessel of 509 75-95 tons measurement at the disposal of the charterers, to go round to Bordeaux as soon as possible, and there receive on board within a specified time, a full and complete cargo of lawful goods, not exceeding what the vessel could stow and carry with safety, and also passengers to be transported to New Orleans. He further binds himself, whenever his vessel is laden and he has signed the bills of lading and obtained his clearance, to make sail with the first fair wind and proceed direct to the port of destination, where, after a faithful delivery of the cargo to the bearer of the bills of lading, he is to receive for freight in ready cash, without any discount, the sum of \$2,000. In consideration of this sum he lets the whole capacity of the hold of his vessel and the between decks to the charterers. He reserves only room enough between decks for five water casks and ten barrels of provisions. A commission of two and a half per cent. is stipulated to be paid by the master to the charterers on the amount of the freight, and also a like commission to the correspondents of the charterers at New Orleans. Upon these correspondents is expressly imposed the duty of collecting the freight. For the performance of the clauses and conditions of the charter party, the contracting parties mutually pledge the ship and cargo.

This action is instituted against the consignees or correspondents of the charterers, who have duly accepted the charter party, and thus bound themselves to collect the freight according to the stipulations of the contract. They, however, resist the demand of the libellant for the sum of \$816.04, being the balance due on the sum of \$2,000, upon the ground that the goods of various holders of bills of lading, have in the aggregate been damaged to that amount on the voyage from Bordeaux to this port.

There are two kinds of contracts passing under the general name of charter party, differing from each other very widely in their nature, their provisions, and in their legal effects. In one, the owner lets the use of the ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities

of owner. The master is his agent, and the mariners are in his employment, and he is answerable for their conduct. The charterer obtains no right of control over the vessel, but the owner is in fact, in contemplation of law, the carrier of whatever goods are conveyed in the ship. The charter party is a mere covenant for the conveyance of the merchandise, or the performance of the service, which is stipulated in it. In the other kind of contract by charter party, the vessel is herself let to hire, and the charterer takes her into his own possession. It is a contract for the lease of the vessel. The owner parts with possession and the right of possession, and the hirer has not only the use but the entire control of the vessel herself. He becomes the owner during the term of the contract. He appoints the master and mariners, and is responsible for their acts. If goods are taken on freight, the freight is due to him; and if by barratry or other misconduct of the master or crew, the shippers suffer a loss, he must answer for it. Ware's Rep. 149, 156; 1 Sumner, 551.

From these general principles regulating the two kinds of contracts of affreightment by charter party, it follows that a person may be owner for the voyage, who, by contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry the cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership.

The distinction here drawn, is in strict accordance with the decisions of the American courts, as will be seen by reference to the case of *Hoot v. Goverman*, 1 Cranch, 214, and to that of *Manscardier v. The Chesapeake Insurance Company*, 8 Cranch, 39. The language of Lord TENTERDEN in moving for the affirmance of the judgment of the exchequer chamber in the case of *Calvin v. Newberry*, 6 Bligh, 189, would lead to the conclusion, that the principles of law applicable to this subject, are differently understood in England from what they are in this country. But the decisions of the Supreme Court of the United States must necessarily control my own judgment. And looking to those

Eames, Master of Ship *Horatio* v. Cavaroc & Co.

decisions, I have no hesitation in saying that by the terms of the charter party now under consideration the general owner was the owner for the voyage. Through his agent, the master, he retained the possession, command and navigation of the ship, and contracted to carry the cargo on freight for the voyage. The charter party is therefore to be considered as a mere affreightment sounding in covenant; and the freighter is in no just or legal sense clothed with the character or responsibility of ownership.

Having then ascertained the true position occupied by the parties under the stipulations of the charter party, we will now proceed to determine their rights in the present suit, and it is evident that this can only be done by a consideration of all the terms of the instrument taken together.

The libellant has sought his remedy for the enforcement of his rights in the only mode which has been fairly reserved for him under the contract. By his compliance with the obligation imposed upon him to deliver the cargo to the holders of the bills of lading, as a condition precedent to his receiving the freight, he has lost his lien on the cargo; and his recourse for compensation is clearly against the consignees as the representatives of the charterers. The mutual pledge of the ship and cargo for the faithful performance of the contract, contained in one of the clauses of the instrument, does not alter the case. Such a pledge is but the affirmation of the general principle of the maritime law that the ship is pledged to the merchandise, and the merchandise to the ship, for the contract of shipping; and would undoubtedly have the effect of preserving the lien on the cargo in the absence of any inconsistent stipulation, which may be fairly construed into waiver of the lien. Lord TENTERDEN, in his *Treatise on Shipping*, has deduced from the cases this general result; the right of lien for freight does not absolutely depend on any covenant to pay freight on delivery of the cargo, but it may exist if it appears that the payment is to be made in cash or bills before or at the delivery of the cargo; or even if it does not appear that the delivery of the cargo is to precede such payment. The correctness of this principle is also recognized by Mr. Justice STORY, in the case of *The Schooner Volunteer and Cargo*, 1

Eames, Master of Ship Horatio v. Cavaroc & Co.

Sumner, 571. In the present case we have seen that it is expressly stipulated in the charter party that the freight is to be paid *after the delivery of the cargo* to the holders of the bills of lading. It was in accordance with the stipulation that the delivery took place, and a part payment of the freight, to the amount of \$1,383.96, was made by the consignees. They refuse to pay the balance claimed in the libel, for the reason already stated; and the question is, are they justified, under all the circumstances of the case, in longer withholding it?

Independently of the charter party, the ship was bound for the merchandise, and the master was bound to transport and deliver the cargo according to the terms of the bills of lading. He is responsible for any damage the cargo may have sustained. But the stipulation in the charter party which imposed upon the respondents, as consignees of the charterers, the duty of collecting the freight, made it their duty, necessarily, to ascertain the reasons why payment was withheld by the holders of the bills of lading. It became their duty to ascertain, within a reasonable time, in some satisfactory mode, the nature and extent of the damage alleged to have been sustained by the cargo. It was for them to cause examinations to be made by disinterested persons capable of estimating the amount of the damage; and thus furnish the court the requisite evidence to guide its judgment. Except in reference to the damage sustained by that portion of the cargo consigned to W. F. Vredenburg & Co., no legal or satisfactory evidence has been introduced. The general declarations of the owners of the damaged goods, unaccompanied by any specific statements of disinterested persons, showing the nature and extent of the damage, are entirely insufficient, and must be rejected by the court.

The libellant has placed himself in a position to entitle him to the equitable consideration of a court of admiralty. It is in evidence that while urging upon the respondents his right to be paid the amount of freight stipulated by the charter party, he at the same time tendered them a bond, with sufficient security, to hold them harmless against the claims of the holders of the bills of lading, for the alleged amount of damages sustained on the different consignments. This offer of security was refused by

The Steamer Norma.

the respondents, and the libelant has been compelled to resort to these proceedings for the assertion of his legal rights.

I shall order that a decree be entered in his favor for whatever balance may be due him, after deducting the amount of damage sustained by that portion of the cargo consigned to Vredenburg & Co., and also the commissions stipulated in the charter party, to be paid by him to the respondents, as consignees of the charterers. I shall further decree that the costs of this suit be paid by the respondents.

GEORGE W. BONE, Salvor Libelant *v.* THE STEAMER NORMA
Respondent.

*District Court of the United States. Eastern District of Louisiana.
In Admiralty.*

HON. THEO. H. McCALEB, JUDGE.

1. That portion of the 1st section of the act of Congress regulating the fees and costs of the clerks, marshals and attorneys of the circuit and district courts of the United States, which provides that "in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent. on the first five hundred dollars of the claim or decree, and one-half of one per cent. on the excess over five hundred dollars," should not be so construed as to give the marshal a right to exact said commission in a case where the claim of the libelant has been settled before any claimant of the property libeled appears in court.
2. The law did not intend to confer a gratuity upon the marshal; it contemplated the presence of both the parties litigant in court, and the whole progress of the litigation short of the sale under the final decree; or, the possession of the property by the marshal, and the usual proceedings under an interlocutory order of sale, without the sale itself.

Wm. Cornelius, for the United States marshal.

G. B. Duncan, for the libelant.

McCALEB, J.—The claim for salvage compensation in this case has been settled without a sale of the property libeled, and

before any claimant thereof appeared in court. A rule has been taken on behalf of the United States marshal, upon the libelant, to show cause why a commission of one per cent. on the first \$500 of said claim, and one-half of one per cent. on the residue thereof, should not be paid to him (the United States marshal), in conformity to the act of Congress, approved February 26th, 1853, entitled "An act to regulate the fees and costs to be allowed clerks, marshals and attorneys of the circuit and district courts of the United States, and for other purposes." The provision of the 1st section, upon which his claim for commissions is founded, is as follows: "For serving an attachment *in rem* or a libel in admiralty, two dollars; and the necessary expenses of keeping boats, vessels or other property, attached or libeled in admiralty, not exceeding two dollars and fifty cents per day; and in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent. on the first five hundred dollars of the claim or decree, and one-half of one per cent on the excess over five hundred dollars: provided, that in case the value of the property shall be less than the claim, then, and in such case, such commission shall be allowed only on the appraised value thereof."

It is admitted that the marshal has received his fees for serving the usual process upon the property, and for the custody thereof. For services actually rendered, therefore, he has been duly compensated; and the question now to be determined is, can he, in conformity to the provisions of the act referred to, be paid a commission on the amount of the libelant's claim? If he can, upon the grounds contended for by his counsel, then it must be given to him as a mere gratuity. Is the law to receive such a construction as would be positively unjust in principle, and render it oppressive in its operation upon suitors, who claim the aid of the court in the assertion of their rights? The language of the law is certainly not free from difficulty. But it can hardly be supposed that the lawgiver intended that an officer of the court should be gratuitously compensated at the expense of a litigant. In this case it is not pretended that any services have been rendered, to entitle him to be paid the commission

The Steamer Norma.

demand. The law, I think, contemplated the presence of *both the parties litigant in court*, and the whole progress of the litigation short of the sale under the final decree; or it contemplated the possession of the property by the marshal, and the usual proceedings by advertisement, &c., under an *interlocutory* order of sale without the sale itself. It intended to provide an adequate compensation to the marshal for the trouble and responsibility he assumes up to the moment of sale, and to put it out of the power of litigants to deprive him of such compensation for the trouble and responsibility thus assumed, by a compromise or settlement before a sale under a final decree, or a sale under an *interlocutory* order of court. This, in my judgment, is the only fair and rational interpretation to be given to the provision of the act of Congress referred to.

It is therefore ordered that the rule be discharged.

DECISIONS
OF THE
HON. ROSS WILKINS,
JUDGE OF THE U. S. DISTRICT COURT
FOR THE
DISTRICT OF MICHIGAN,

RENDERED SINCE THE FORMER PART OF THIS VOLUME WAS
PLACED IN THE HANDS OF THE PUBLISHERS.

THE UNITED STATES, on Information of THOMAS CHILVERS *v.*
THE STEAMBOAT OTTAWA, GEO. B. RUSSEL, Claimant.

*District Court of the United States. District of Michigan. In
Admiralty.*

HON. ROSS WILKINS, JUDGE.

1. The 42d section of the act of Congress passed August 30th, 1852, entitled "An act to amend an act, entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam' (passed July 7th, 1838), and for other purposes," cannot be so construed as to exclude boats or vessels ordinarily used as ferry or tug boats.
2. Where a steamboat, built for a ferry boat, used in her daily employment as such, and occasionally as a tug boat, was employed one day in making several trips from Detroit to Hamtramck, three miles distant, carrying passengers to the grounds of the state fair; *Held*, that such use did not change the ordinary character of the boat, or take her from the exception of the statute, or make her liable to the penalties of the act.

Levi Bishop, for libelants.

Walker & Russel for respondent.

WILKINS, J.—This is a libel and information filed by the district attorney of the United States, on the complaint and information of one Thomas Chilvers, a resident of said district, in order to recover from the steamer Ottawa the penalty, by the second section of the act of Congress of 1838, imposed on steamboats propelled in whole or in part by steam, transporting merchandise or passengers upon the navigable waters of the United States, without first having obtained a license under the provisions of the law, requiring the inspection of boilers and machinery.

The first section of the act of 1852, amendatory of the act of 1838, provided that no such license should be granted by any collector, unless upon satisfactory evidence that all the provisions of the law were complied with, excepting, however, from its penal application, all steamers used as ferry boats, tug boats, towing boats and steamers under 150 tons burden, and used in whole or in part in the navigation of canals.

By the libel, the court is informed, that on the 1st of October, 1856, the steamer Ottawa, owned by George B. Russel, was employed in the transportation of passengers on the Detroit river, between this city and the adjacent township of Hamtramck, without having been inspected or licensed pursuant to law.

To this allegation the respondent avers, that the steamer Ottawa was built and used as a ferry boat and tug boat, and was enrolled and licensed as such, and as such was engaged on the day specified, and was always so used before and since: and that on the said day she made her regular trips as a ferry boat between Detroit and the town of Windsor, Canada West.

The language of the exception contained in the forty-second section of the act of 1852, is very explicit; and taken in connection with the obvious design of the law, which was "the better security of the lives of passengers on board of vessels running on voyages between distant ports," cannot be so construed as to exclude boats or vessels ordinarily used as ferry or tug boats.

In this case there was evidence that the municipal authority leased to the respondent the landing and wharf at the foot of Woodward avenue, to be used as a ferry landing: that he was the proprietor of a number of boats, used by him for the pur-

poses of a ferry boat between this place and Windsor : and that this boat was built as a ferry boat, used as such, was daily employed in this ferry line, and occasionally as a tug boat. There is no proof that she was ever used as a passenger steamer, running between distant ports with either freight or passengers. On the day alleged in the libel, there being a state fair in the township of Hamtramck, she was employed in several trips in conveying visitors from the city to the fair ground, and it is contended by the libelant, that these occasional trips changed her ordinary character as a ferry boat and took her out of the exception of the statute. I think otherwise. The exception is not confined to vessels licensed as ferry boats. Ferry license and ferry usage are two different terms. The one applies to the privilege, the other to the vessel ; and the legislature evidently had in view the inspection of vessels constructed for voyages or trips of more than an hour's duration, and with the usual accommodations of state rooms and dormitories as passenger boats. The one class of steamers is more exposed to peril than the other, and to afford security to life was the object of the penalty imposed, while the exception cannot be considered as embracing *only* licensed ferries.

Whether this boat was engaged at the time as a ferry boat, in running between this place and Hamtramck, is not deemed material ; or, whether there was a regular license or not. There being evidence that she was built as a ferry boat, and that such was her daily occupation, is considered as bringing her within the spirit and letter of the statutory exception.

Libel dismissed.

THOMAS MILLIGAN v. THE PROPELLER B. F. BRUCE.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. The act of July 20, 1790, for the government and regulation of seamen in the merchant service, providing that if an agreement in writing be not made, &c., with seamen, they shall be entitled to the highest rate of wages that shall have been paid for a similar voyage within three months preceding the shipping, does not apply to seamen upon tug boats.
2. Where a seaman was proved to have served the year previous for a particular rate of wages, and shipped with no agreed rate; *Held*, that in the absence of contrary proof, the last year's wages would be presumed right, and taken as the measure of wages for the present.
3. A book of original entries, kept by the captain of the propeller, who was also part owner, is inadmissible to prove cash payments, there being no other proof of these payments.

Jerome & Swift, for libellant.

Towle, Hunt & Newberry, for respondents.

WILKINS, J.—Libel for mariner's wages as engineer of the propeller, employed as a tug boat from the mouth of the River Detroit to Port Huron.

The libellant claims at the rate of \$70 per month, the highest rate of wages given to engineers.

The answer does not deny that he was employed as engineer, but alleges his incompetency to act in that capacity, and that, in consequence of his incapacity and ignorance the propeller suffered great damage, which, as a pecuniary loss, covers more than the wages to which he would be entitled.

The libellant alleges that he was employed as engineer, at no particular rate of wages, and that, as no agreement was made in writing, he is entitled, by the act of 1790, to the highest wages paid for such services.

540 DISTRICT COURT OF THE UNITED STATES.

The Propeller B. F. Bruce.

The law cited does not apply to this case, the propeller not being engaged in foreign commerce.

The libelant has attached to his bill an account stated, claiming \$70 per month, for six months and twenty-eight days, and giving credit for sundry payments, amounting, in all, to \$68, specifically enumerated, item by item.

The answer responds that the claimant is ignorant of the actual time the said libelant worked, and leaves him to the proof of the same. The proofs are, that the libelant went on board of the propeller on the 10th of February last, and left on the 28th of August; and that the vessel commenced running on the 1st of May: that he was engaged about forty-seven days in February and March in fitting up the engine and preparing it for use in the approaching season: that he had served the previous season as engineer, and was continued in that capacity, and that he had got the last year the sum of \$45 per month.

The court will allow now no more than that sum, and will allow him at that rate from the 10th of February, the period fixed by the witness Donevan as the time when he commenced his labor as engineer. He was acting in that relation when he was thus employed, and in the absence of satisfactory proof to the contrary, or that he was working by the day, the court must allow the usual wages per month, which he received the seasons previous. A book has been introduced in evidence, as a book of original entries, kept by the captain, showing that the libelant commenced "fitting out" on the 7th of February, and that the boat commenced running on the 1st of May.

This book exhibits certain cash payments made by the captain, who is part owner of the vessel, which are not admitted by the libelant.

These charges are inadmissible, there being no other proof of these payments.

To admit such evidence as conclusive against the mariner would subject seamen to great injustice. There is no necessity existing why the old rule should be modified in this respect. Cash payments should be accompanied by corresponding receipts; and where a seaman cannot write, his mark should be taken in the presence of the witness. To adjudge otherwise,

would make the party interested competent proof of payment. Moreover, in this case the entries are not of such a character as to entitle them to implicit credit. The libel specifically set forth the payments made, and the answer should as specifically have denied the exhibit, and directed attention to the other payments if they actually existed. Otherwise, we are called upon to reject the positive oath of the libelant, and admit the statement of the respondent without oath.

The court, therefore, decree that the libelant shall be paid for six months and twenty-eight days, at the rate of \$45 per month, amounting to \$308.48. Deducting therefrom the payments which he has admitted in his libel, of \$68, with the \$16 admitted on trial to Mr. Towle, making in all a credit of \$84, and adjudicating the balance at \$222.48. The cash paid by Mr. Carey was neither proved or admitted.

As to the tender alleged, the court is of opinion that no legal tender was proved; \$45 per month was offered to the proctor, but leaving the time still a subject of controversy. A positive sum, covering the whole controversy, should have been offered.

Decree for \$222.48, with costs.

GEORGE B. RUSSEL v. THE BRIG EMPIRE STATE.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. Whatever authority the city of Detroit, as a corporation, possessed over the premises in question, to dispose of or lease them, must be derived from the statutes of the United States.
2. The "town of Detroit" was laid out into lots and streets, and public squares, &c., under the act of Congress of April 21, 1806, by the governor and judges; and on the 27th of April, 1807, they fully discharged their trust, and thus was Woodward avenue made a public highway, to the water's edge of Detroit river.

The Brig Empire State.

3. By the act of 1842, "*the lands*" thus divided and remaining unappropriated under the act of 1806, were vested in the mayor, recorder and aldermen of the city of Detroit, to be disposed of by them, in their discretion.
4. The city obtained no title whatever to the soil of the streets, the fee of which continues in the original dedicator, unless the purchaser of the lots bounded thereby be considered as having the fee, under their respective grants, and therefore cannot occupy them, or give authority for others to do so.
5. Neither the governor and judges, as the old land board, nor their successors, the city authorities, as the new land board, have now any power, beyond that of the regulation of the streets and public squares; and this does not include the right to sell, or lease, or exercise any act of ownership.
6. The city authorities may erect wharves at the termini of their streets, suitable for landing, but by so doing such erections become free to the public, as extensions of the streets, and the city has no authority to exact toll for ingress or egress.
7. The intention of Congress has been clearly manifested by the act of 18th of May, 1796, to ordain all rivers actually navigable, as common law rivers, whether or not the tide ebbs and flows.
8. Wharves or docks must be constructed so as not to impair, but to facilitate navigation and commerce, and as such be open to the landing of all—the moorage of all vessels, without "*tax, impost or duty.*"
9. When a highway upon the land, and another upon the water, adjoin, the right of passage from one to the other is free to all. *Fowler v. Mott*, 19 Barb. 204.
10. A lease, giving the lessee "the sole and exclusive right to use the public wharf for his ferry boat," does not authorize the collection of toll for wharfage.

Walkers & Russel, for libelants.

J. M. Howard and Towle, Hunt & Newberry, for respondent.[1]

George B. Russel, the libellant, was the lessee, from the city of Detroit, of the wharf at the foot of Woodward avenue, one of the principal streets of the city.

When the city was originally laid out, under authority of Congress, Woodward avenue was laid out and platted to the Detroit river. It has subsequently been extended by filling up,

[1] This case, and the succeeding case of *George B. Russel v. The Ass R. Swift*, were, by consent of counsel, tried and argued together, and but one argument made. They were decided, however, upon different grounds, and a separate opinion rendered by the court.—EDITOR.

The Brig Empire State.

and the erection of a wharf, some 300 or 400 feet into the river, which wharf is the one in question.

The Empire State, a large vessel used in navigating the lakes, while lying at the dock immediately below Woodward avenue, lapped on to the street, while engaged in unloading her cargo. Russel then brings his action for wharfage.

A. Russel for libelants.

The right to build wharves in any manner, so as not to impede navigation, is disputed by no authority of the civil or common law. There is a distinction between the right to approach the shore where the river is in a wild state, and the harbor of a crowded city. Institutes of Justinian, lib. 2, tit. I, 1 and 4; Digest I, 8, 6; *Bugott v. Orr*, 2 Bos. & Pul. See also 3 Kent, 417, n. 6, 418, and *Blundell v. Catterall*, 5 B. & Ald. 268.

By the common law navigable waters were those affected by the tide, and innavigable were tideless, although they were public rivers, and actually navigable. 3 Kent, *ubi supra*; Ang. on Water Courses, § 596, *et seq.*

On navigable rivers the adjoining proprietors took to the edge; on innavigable, to the centre of the stream. *Howard v. Ingersoll*, 13 How.; *Berry v. Earle*, 8 Greenl. 269; *Spring v. Russell*, 7 do. 273; *Spring v. Seavey*, 8 do. 138; *Wadsworth v. Smith*, 2 Fairf. 278; *Claremont v. Carlton*, 2 do. 369, 8 Foster, 198; *Slate v. Canterbury*, 3 N. H. 34, 9 do. 461; *Lunt v. Hal-land*, 14 Mass. 147; do. 600, 481; 20 Pick. 186; 2 Conn. N. S. 481; 9 do. 138; 7 do. 186; 8 do. 231; *Ex parte Jennings*, 6 Cow. and note; *Palmer v. Mulligan*, 3 Caines; *Hooper v. Jennings*, 201, 91; 17 Johns. 20; 26 Wend. 408; 5 Cow. 216; 11 Ohio, 311, 138; 30 Ohio, 496; 16 do. 540; 1 Randolph (Va.) 417; 3 do. 33; 4 Call, 411; 3 Blackf. 193; 5 H. & Johnson (Md.) 195; 5 Scam. 500; 2 Swan; 1 Iredell, 395; Taylor's Rep. 196; 6 Martin, 119; *Moore v. Sanborn*, 2 Mich.; 2 Port. (Ala.) 436; 1 McC. 580; 2 Binn. 475.

But the definition of the term navigable has been altered to conform to the fact. *Carson v. Blazer*, 2 Binney; 2 Swan, 9; *La Plaisance Harbor Co. v. Monroe*, Walker's Chy. R.; *Moore v. Sanborn*, 2 Mich. R.; *Bowman v. Watson*, 2 McLean.

By the common law, the riparian proprietor upon navigable waters has the right of erecting wharves, and controlling the access to the river. 2 McLean, 382; *Blundell v. Catterall*, *ubi supra*; Ang. on W. Courses, § 55; *Morgan v. Reading*, 3 S. & M.; *Ball v. Hobart*, 3 Term R.; 7 Conn. 186; 2 Ohio, 307; 11 *ibid*, 138; 2 *do*. 403; 1 Yates, 167; 9 S. & R. 26.

The governor and judges so supposed. See their report to Congress. State Papers, Vol. V, 1831. The United States passed a law laying a wharf in Detroit. Stat. at L. Vol. IV, 55. The legislature of Michigan likewise. See Session Laws of 1855, 291.

The ordinance of 1787 was in the nature of a treaty, and was simply declaratory. Ang. on W. C. § 556; Kent, 427; *Strader v. Graham*, 10 How.; *Col. Ins. Co. v. Curtin*, 6 McLean; *Terre Haute Bridge Case*, same vol.; *Harbor Co. v. Monroe*, Walker's Chy. R.; 3 Ohio, 495; 5 Ohio, 410.

The next question as to the street is, has it been dedicated. *Prima facie* the fee to the centre of the street is in the adjacent proprietor, subject to the public easement. *Livingston v. The Mayor of New York*, 8 Wend. and cases cited; 20 Wend. 96; 7 Conn. 48; *Pittsburgh Case*, 6 Peters, 498; 3 Watts, 219; 9 S. & Rawle, 296; 1 Yates, 167.

Highways on land and water are not subject to the same principles of law, nor have they the same incidents. *Ball v. Hobart*, 3 T. R.

Dedication is not predicable of landing places. See 20 Wend. 133, 131. Affirmed on error; 22 Wend.; *Pearsall v. Post*, 3 B. Monroe (Ky.) Rep.

Granting, for the sake of argument, that the street has been dedicated, then the city has the power of regulating. As to extent of this power, see *Kennedy v. Jones*, 11 Ala.; *Rowan's Ex's*, 3 B. Monroe, 232; 7 Conn. 293; 5 Gill & John.; overruling the wharf case in 3 Bland Chy. *Dugan v. The City of Baltimore*. See Rev. Charter of the city of Detroit, pp. 24, 30, 68.

J. S. Newberry, for respondent.

I. The entire right of soil in the bed of the Detroit river is in the government or the public, or it has been dedicated to the

public, either of which precludes it from being exclusively appropriated by any private person or corporation.

The ordinance of 1787 fully dedicates the Detroit river to the public. It is a great natural highway, and carries with it all the incidents and appurtenances of a highway. 7 Greenleaf, 275, 290; *Spring v. Russel*, 3 Shepley, 269.

The common law rule, that the riparian proprietor of rivers where the tide does not ebb and flow, owns the bed of the river *ad flum aquæ*, has in no state been applied to rivers forming national boundaries. See 17 Wend. 597; 12 Barb. 201; 19 Barb. 490. The whole theory of navigable rivers, thus defined, arose in England, where, as a *matter of fact*, the ebb and flow of the tide was the criterion of *navigability*. The most enlightened jurists of *this* country have refused to apply to our vast rivers and inland seas the puny distinctions and doctrines which have been applied to their insignificant rivers. In New York, see 17 Wend. 597, 598, 599; 12 Barb. 201, 206; 19 Barb. 490. In Pennsylvania, see 2 Binney, 475, 483, 484; 14 Serg. & R. 71; *Zimmerman v. Union Canal Co.*, 1 Watts & Serg. 351; *Phil. v. Trenton R. R.*, 6 Whart. 44; *Bailey v. Phil. W. and Baltimore R. R. Co.*, 4 Harrington, 389; *Ball v. Slack*, 2 Whart. 539; *Bacon v. Arthur*, 4 Whart. 439. In Alabama; *Bullock v. Wilson*, 2 Porter, 436, 448; *Mayor of Mobile v. Eslava*, 9 Porter, 577. In South Carolina; *Executors of Cates v. Washington*, 1 McCord, 580. In Virginia; *Hone v. Richards*, 4 Call. In Tennessee; 3 Yerg. 387; 2 Swan, 9. In North Carolina; *Ingraham v. Threadgill*, 3 Dev. 59 (1831); *Collins v. Bemberg*, 3 Iredell, 277. In Michigan; *La Plaisance Bay Co. v. City of Monroe*, Walk. Chy. R. 155; 2 McLean, 376; *Pollard v. Hagan*, 3 How. U. S. Rep. 212, 229.

II. Granting that the adjacent owners have the fee of the bed of the river, then the public have the right to the free and unobstructed navigation of the river, in its entire breadth, as a highway. *Hart v. Mayor of Albany*, 9 Wend. 584; citing 6 East, 427, and 3 Camp. 226, 229; *same case*, 3 Paige 213, 217; *Bacon v. City of Boston*, 3 Cush. 174; 1 Cush. 443; 7 Wend. 291; 1 John, 509; 16 Pick. 175; 13 Mass. 115, 118. Therefore, docks built out to seventeen feet water are an encroachment.

The Brig *Empire State*.

III. All our great rivers are subject to the *easement* of navigation, which includes the right to moor and land at the bank, when necessary. *Hanson v. City Coun. of La Fayette*, 18 Louisiana, 295, 305; *Trustees of Natchitoches v. Coe*, 7 Martin (N. S.), 433; *O'Fallen v. Daggett*, 4 Missouri, 343, 345; 3 Smedes & Marshall, 366, 408; 1 Camp. 517, note; 3 Scammon, 521; 13 Wend. 371; *Brown v. Chadbourne*, 31 Maine, 9, 24; *Stuart v. Clark*, 3 Yerg. 307; 2 Swan, 9.

IV. Wharves may be built between high and low water, but no case can be found where they are allowed to go further, and a fee charged for the use of such erection, without express grant. *East Haven v. Hemingway*, 7 Conn. 186; 9 Conn. 38; 5 Pick. 492, 493, 494; 3 N. H. 324; *Arnold v. Mundy*, 1 Halstead, (New Jersey,) 1, and see pp. 67 and 76; 2 Zab., 441 (N. J.); *Gunter v. Geary*, 1 California, 463, 469; *The Wharf Case*, 3 Bland, 373, 374. See also pp. 380, 382; 20 Pick. 186; 11 Ohio, 138.

V. A ferry or a wharf, &c., &c., with a right to take tolls, cannot be established by a private individual, but only by the sovereign power. 1 Yates, 167; 9 S. & R. 26; 3 Watts, 219; 8 Watts, 454, cited by libelants, were, every one, cases where the ferry was established by an act of the assembly. 31 Maine, 21; 2 Conn. 481; 8 Watts, 434; 10 Yerg. 280; 5 Yerg. 108; 1 Nott & McCord, 387; 13 Illinois, 27; 3 Missouri, 470; 3 Scammon, 53; 8 Greenleaf, 365. The last four cases seem to hold that a person cannot land a ferry on his own land without consent of the state or grant. 3 Bland, 380, 382; 3 Paige, 313; 9 Ohio, 165, 167.

VI. A ferryman has a right to land at a public highway. 2 Rob. (Vir.) 209, 214; 1 Blackf. 43; 3 Bland, 375; 6 Shep. 433 (18 Maine); 19 Barb. Sup. Ct. R. 204, 220. Holding, also, that it is a public common right to pass from a highway on land to a highway on water, when they adjoin.

VII. The common council of Detroit has no power to grant the exclusive use of the highways, streets, &c., of said city, to any individual. *The People v. Carpenter*, 1 Mich. R. 273.

In the case of *Russel v. The A. R. Swift*, the two following additional points are taken:

I. By the *general maritime* law there is no lien created for

supplies, materials, &c., or indeed for anything upon a domestic vessel.

There is but *one* case where the admiralty courts have jurisdiction over *domestic* vessels; and that is by Rule 12 of the Supreme Court, which provided that when the local law gives the *material* man a lien he may proceed in admiralty against domestic vessels. Conk. Ad. pp. 56, 61; *Peyroux v. Howard*, 7 Peters, 324; 4 Wheat. 438; *The Robert Fulton*, 1 Paine, 620; *A New Brig*, Gilpin, 473.

II. The lien of the wharfinger is a common law lien, depending upon possession, and not enforceable if the possession has been parted with. 1 Pet. Ad. 223, 228; Gilpin, 101, 2 Gal. 433.

The brief of the *Hon. J. M. Howard* was not furnished the reporter.

WILKINS, J.—Libel for wharfage, setting forth that the libellant is the lessee, from the city of Detroit, of a wharf situated at the foot of Woodward avenue, and extending beyond the terminus of the said avenue, into the River Detroit.

The answer denies the authority of the city to execute such lease, and avers "that Woodward avenue as originally laid out by the governor and judges of the territory of Michigan, was dedicated to the public as a street and highway extending to the water's edge of the River Detroit, and was from the time of such dedication ever used as a public highway, and that the extension of the said street towards the centre of the river, has also ever been used."

This denial and averment presents the main issue, to which the court will solely direct its attention, considering the other points presented as of minor-importance.

The answers of the libellant to the 3d, 5th and 6th interrogatories propounded by the respondents, admits that the wharf is held by him as an *exclusive* possession, under a conveyance from the city corporation; that *that* portion of the said Woodward avenue which lies between the original margin of the river, and the wharf leased, has been used as a public street for the space of more than twenty years, and that, during that time the ter-

minus of the said avenue, *as used by the public*, extended to the water's edge of the river; and that the said wharf is "practically an extension of the said avenue."

Satisfactory proof has been exhibited to the same effect; and that, for more than twenty-four years, Woodward avenue was always open to the river, and to the uninterrupted egress and regress of the inhabitants of both sides, and the unmolested arrival and departure of vessels.

In September, 1832, large steamers landed there their passengers and discharged there their freight. The lease from the city was executed on the 1st of May, 1856.

For the consideration of \$350 it conveys to the libellant and his assigns for the term of one year "*the sole and exclusive right* to enter upon and use the said wharf at the foot of Woodward avenue," for the purpose of mooring his vessels and receiving and landing passengers and freight therefrom, as a ferry between Detroit and the neighboring province of Canada West, "and entitling him to use the same against all boats and vessels other than his own, engaged in any other employment whatsoever, and which may in any way obstruct or interfere in his use of the said wharf as a ferry landing."

Two questions of considerable interest are embraced in the issue. 1st. The authority of the city corporation to make the lease on which the libellant relies, and 2d. The extent of the privilege conferred.

I. Whatever authority the city of Detroit as a corporation, possessed over the premises in question, to dispose of or lease the same, must be derived from the statutes of the United States.

As a municipal government, it would have only power to regulate, and could only occupy or vacate a public street or highway, dedicated as such, antecedent to its existence as a corporation. Neither can the city be deemed as possessing a *riparian* right unless as proprietor of the fee.

The "town of Detroit" was laid out and platted into lots by numbers, and into streets and public squares by name, under the provisions of the act of Congress of April 21st, 1806. The governor and judges of the *then* territory of Michigan, were authorized to lay out a town "including the whole of the old

town of Detroit," and ten thousand acres adjacent, and "finally adjust all claims to lots therein."

Shortly after the authority conferred by this act, on the 27th of April, 1807, the governor and judges, as the agents of the government of the United States, discharged the trust committed to them; and those portions of the soil dedicated as public streets, became such for common use, and beyond the power of resumption by the original proprietor, with whom alone the fee continued. The dedicatory act of the agent was the act of the principal; the deed of the proprietor for the purposes expressed. And thus Woodward avenue was dedicated as a public highway to the water's edge of the River Detroit.

By the act of 1842, "the lands" thus divided into lots, as by the original plat, remaining unappropriated under the act of 1806, were vested in the mayor, recorder and aldermen of the city of Detroit "to be disposed of by them at their discretion;" and the city was authorized to make deeds to purchasers, or "other sufficient conveyances."

The sole object of this act was to confer upon the city authorities, the power which had been exercised by the old territorial land board, and vest in the city the title to the lots remaining unsold, for purposes of improvement.

By the act of 1806, the power of the governor and judges was limited to the grant of lots as numbered in the plat of the town which they were directed to "lay out," and no greater power is given to the city by the act of 1842.

"To make deeds or other sufficient conveyances" of "the land remaining after satisfying all just claims, and the payment of expenses incurred," are terms in the last statute, not augmenting the power of the city beyond that of the governor and judges, but expressly limiting the donation to the fee of the lots remaining unappropriated. The city obtained no title whatever to the soil of the streets, the fee of which continues in the original dedicator, unless the purchasers of the lots bounded thereby, may be considered as having the fee of the same under their respective grants.

There is no ambiguity in the terms of the grant. One specific object is had in view. To grant the lands remaining unsold

The Brig Empire State.

under the prior act to the city, to be applied to objects of public improvement: evidently meaning that the proceeds arising from the sale of the unsold lots should be so applied.

The public streets remain as originally dedicated and no right of possession is given, and there is no transfer of the fee in them; and, consequently the city cannot occupy them, except for purposes of regulation, either by public buildings, for public use, or give authority to others to do so. The character of the use cannot vary the terms of the grant, or convey that which was expressly withheld.

The public squares and streets thus dedicated, are beyond all subsequent change to another purpose, and the corporation is as much inhibited as the private citizen. Neither the governor and judges, as the old land board had, nor their successors, the city authorities as the new land board, have now any power beyond that of regulation of the streets and public squares. In this is exercised the functions of municipal government, but the power to govern is not, nor does it include the right to sell, lease or exercise over the same any act of ownership.

In the language of the Supreme Court of the state in the case of *The People v. Carpenter*, "the common council of the city of Detroit have no power to grant the exclusive use of any of the streets to individuals." The exercise of such authority is injurious to public and private rights, and contrary to the act of dedication. Such rights are vested rights—the right of free passage over and through the dedicated public street; and it is not competent, even for the legislature of the state, much less for the common council of the city, to pass any act or ordinance, which would in any wise impair, restrict or defeat the right of way under the act of dedication.

By the recorded plan of the city, confirmed and made of record in 1807, Woodward avenue and most of the parallel streets running at right angles with Jefferson avenue, terminated south at the water's edge of the River Detroit; or, in other words, they run to the river. Such was the declared intention of the dedicating. To that extent they are common to all as highways. Any building, therefore, whether public or private, whether a court house, jail, city hall, market or wharf, erected upon them,

either by the corporation or others under their authority, and defeating the main objects of dedication, would amount to an obstruction, and as a public nuisance would be liable to be abated.

Unquestionably, the city may improve, ornament and grade for public convenience, either by enlargement or extension, the public streets; and with a view to public accommodation, erect at their termini, in the river, suitable wharves or landings, but, by so doing, such erections become free to the public, as extensions of the streets, and the city has no authority, and can confer none, to exact toll for egress or regress.

But these streets are not only the dedicated highways of the city of Detroit, in which the city has no other power than that of regulation, but, as highways they have their declared termini in connection with another public highway, national in its character, common to all the inhabitants of the United States, and, by treaty, free to the subjects of a foreign power.

The 4th article of the ordinance of 1787, in declaring the navigable waters leading into the Mississippi and the St. Lawrence, common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and all the states, "without any tax, impost or duty," comprehends the River Detroit, and negates the right of the United States, or of any state, or any subordinate power, by law or ordinance, to exact any fee, charges or impost in its navigation. It is free to all for the purposes of commerce and trade.

And the 9th section of the act of the 18th of May, 1796, is not only declaratory of the same; but in making a distinction between the streams not, and those navigable, where the opposite banks belong to different persons, and enacting that their beds shall belong and be common to both, clearly manifests the intention of the law making power to ordain all rivers actually navigable as common law rivers above the flow of the tide. But the court does not consider this issue to involve the right of a riparian proprietor. The city corporation is not such, and the river being a national public highway, the city authorities cannot appropriate any portion of it to its use so as to obstruct its free navigation. Its wharves or docks must be so constructed as not

to impair, but facilitate navigation and commerce; and, as such, be open to the landing of all and the moorage of all vessels, "without tax, impost or duty."

The act of dedication of the streets, the declaratory ordinance of 1787, the treaty of 1794, are all in accordance with this position. The streets are free; the river is free. Both may be improved at the expense of the city, for the public benefit, as streets are graded and paved, but not to the detriment of private right thus solemnly and repeatedly established. Any other construction would seem to frustrate the intention of the dedication; for, should the city possess the power to wharf and lease the termini of all the streets communicating with the river, all access to the city from the latter would be subject to "tax, impost and duty," in contravention of the ordinance, and the right of way prescribed by the dedication of 1807.

The leading case cited in the argument, from 19th of Barbour, of *Fowler v. Mott*, fully supports this view. The court there declares that "our public highways are equally free to all to the water's edge, if they extend so far. It is a common right to pass from one highway to another, when they adjoin each other. Such is the law of highways upon the land; and there can be no difference in principle, where one highway is upon the land and the other upon the water. Both are free for the passage of all."

Independent of these considerations, which are conclusive, the privilege granted to the libellant by the lease, would not warrant the collection of wharfage. But the lease, in giving him "the sole and exclusive right to use the public wharf for his ferry boats," does not authorize him to charge wharfage as to other vessels mooring there. Conceding the validity of his lease, any obstruction of his privilege, would make the trespasser amenable to another tribunal, and in another form of action.

Libel dismissed, with costs.

GEORGE B. RUSSEL v. THE ASA R. SWIFT.

District Court of the United States. District of Michigan. In Admiralty.

HON. ROSS WILKINS, JUDGE.

1. A wharfinger's lien cannot be enforced in admiralty against a domestic vessel.
2. Rule 12 of the Supreme Court only allows proceedings *in rem* in cases of *domestic* vessels, "where by the local law a lien is given to material men for repairs, supplies or other necessities."
3. A wharfinger is not a material man, but only a lessor, for the time being, of a part of his real estate to be used as moorage.
4. The lien of the wharfinger is only enforceable as a *common law* lien; if he part with his possession of the vessel, his lien ceases.

A. Russel, for libellant.

J. M. Howard and *J. S. Newberry*, for respondents.[1]

WILKINS, J.—This libel is for wharfage. The libellant is the proprietor of a wharf erected by him, on his premises, adjacent to Woodward avenue, and bounded by the same and the River Detroit. His wharf extends some twenty-four feet into the river.

He is also in possession of a wharf in Canada, on the opposite side of the river. His deed calls for land "to the River Detroit." His title has been questioned; but that point, as well as the proof in relation to the use of either wharf by the Swift, need not form part of this opinion, as the decision turns upon other considerations.

Fully recognizing the right of the owners of water lots, as riparian proprietors (although the River Detroit is, to all intents and purposes a national highway and boundary), to construct wharves, to any extent, in front of their premises, *so as not to*

[1] This case was fully argued with the preceding case of *Russel v. The Empire State*. For the arguments of counsel, see that case.

interfere with or obstruct the free navigation, and to charge wharfage for the use of the same; and disposed to sustain, until overruled by the appellate tribunal, every such claim against a *foreign vessel*; yet this issue must be determined adverse to the libellant, because the Asa R. Swift is a *domestic vessel*, as appears by her enrollment and license, and has her home port at Detroit.

The local law gives a lien for wharfage, but such lien cannot be enforced in admiralty, under rule 12th, prescribed by the Supreme Court of the United States.

By the 6th section of the act of 1842, the Supreme Court was invested with the power to prescribe and regulate the *whole practice* of the courts of admiralty of the United States, thereby giving to *this rule* the force and effect of a statutory provision. It was also formally adopted by this court. And *that* rule directs, that proceedings *in rem* shall *only* apply to cases of *domestic ships*, "where, by the local law a lien is given to *material men* for supplies, repairs or other necessities."

A wharfinger is not a *material man*, within the spirit and intention of this provision. He furnishes no material that forms part of the ship.

Material men, are such as supply the materials for the structure or repair of vessels, as the lumber merchant, who furnishes the timber, the artisan, who ornaments and preserves with paints and oils, the ship chandler, who supplies the canvas and cordage, or the manufacturer, who constructs the propulsion power. The wharfinger cannot be so considered, and is expressly excluded by the terms of this *authoritative* judicial regulation. He is only a *lessor* for the time being, of a part of his real estate, to be used as a moorage. He supplies the convenience of dockage, and the facility of discharging passengers and freight, but no material for the use of the ship.

Mr. Justice STORY, who drew up these rules, makes this distinction, in *Ex parte Lewis*, 2 Gallison, 483. But wharfage not being a lien under the general maritime law, and only such by the statute of the state, the claim as regards the occasional occupation of the Canada wharf, is only enforceable as a *common law lien*.

As such, the wharfinger could detain the vessel until payment,

The Asa R. Swift.

but if he failed to do this, and parted with his temporary possession, his lien ceased, and such was the ruling of Mr. Justice STORY, in the case already cited from 2 Gallison.

This libel is therefore dismissed, with costs.

NOTE.—This case was taken by appeal to the Circuit Court of the United States, and will probably be decided in June 1857, and if reported will be found in 7 McLean.—EDITOR.

INDEX.

A

ABANDONMENT.

1. Where a vessel is found entirely deserted or abandoned at sea, she is, in the sense of the maritime law, a derelict. *The Ship Charles* ada. *Evans et al.*, 329

2. To constitute a derelict in the sense of the maritime law, it is necessary that the thing be found deserted or abandoned upon the seas, whether it arose from accident, or necessity, or voluntary dereliction. *The Steamboat T. P. Leathers* ada. *Montgomery*, 421

3. The abandonment of a steamboat by the master, to the care and protection of the master and crew of another steamboat for the purpose of procuring assistance and safety, is not a case of derelict. *Ibid.*

ADMISSIONS.

See EVIDENCE.

ACTION QUI TAM.

See PENAL STATUTE.

AFFIDAVIT OF MERITS.

1. Upon a motion to vacate an order *pro confesso*, and for leave to answer, the respondent must satisfactorily account for his laches, and exhibit by answer, or affidavit, a meritorious defence. *The Young America* ada. *Scott*, 107

2. An affidavit read with a view of showing a meritorious defence, upon a motion to set aside default, and for leave to answer, in a case of collision, which

does not deny the collision, and states the opinion of the affiant that the collision was not occasioned by the negligent conduct of the master and officers of the vessel libeled, but was the result of unavoidable accident, without setting out the facts upon which the opinion is based, was held insufficient. *Ibid.*

AFFREIGHTMENT.

See CONTRACT OF AFFREIGHTMENT.

AMENDMENT.

See POSSESSORY SUITS, 1, 2. *The S. C. Ives*, 205

ASSIGNMENT OF CLAIMS.

See LIEN, 4. *Carroll v. The T. P. Leathers*, 432
See LIEN, 5, 6. *The George Nicholas*, 449

B

BILL OF LADING.

Where it was shown by the bill of lading and the testimony of the shippers, that a cargo of coffee was in good order when it left the port of Boston, and it was proven to be in a damaged state when it reached the consignees, in New Orleans, the necessary conclusion must be that the damage was caused while it was on board the ship. *The Ship Norman*, 525

See LIEN, 48. *Evans v. Cavaroc*, 528
See CHARTER PARTY, 4, 5. *Ibid.*
See COMMON CARRIERS AND CONTRACT OF AFFREIGHTMENT.

BILL OF SALE.

1. Where one sells a steamboat with all appurtenances, &c., and prior to the sale the owner had procured a new ash-pan for the boiler, which had been delivered to the owner, but was not placed on board the boat, *held*, that the ash-pan passed under the bill of sale as appurtenant to the boat. *The Steamboat Fashion* ada. *Newberry*, 67

BLOCKADE.

1. By the usage of nations, and according to the principles of natural reason, it is not lawful to carry anything to places blockaded and besieged. *The Brig Nayade* ada. *Ingraham*, 366

2. The act of sailing with the intention of going to a blockaded port, with a knowledge of the blockade, is a violation of that blockade and works a condemnation of the ship. *Ibid.*

3. Where vessels sail without a knowledge of the blockade, a notice is necessary. The right to treat a vessel as an enemy, is founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact. *Ibid.*

4. The return of a vessel to a blockaded port, after she has been warned off, affords strong ground for presuming a criminal intent, and it is incumbent upon the master to rebut the presumption and justify his conduct. *Ibid.*

5. Where want of water is alleged as the reason for returning to a blockaded port, the evidence of the fact must be very clear and satisfactory, before it will be received. The testimony of the master and crew alone, unsustained by any corroborating circumstances, would be lightly regarded. *Ibid.*

6. But although the rule of law is stringent in its nature, it does not exclude all reasons based upon a want of water or provisions as a ground of justification. On the contrary, a case of overruling necessity may arise from the danger of perishing from famine; and to contend against such a proposition, would be resisting the plainest dictates of humanity. It is not, therefore, the fact itself we are to reject, but the suspicious evidence by which that fact is generally attempted to be proven. *Ibid.*

7. Where the court is satisfied that the

re-appearance of a vessel off a blockaded port, was caused by a want of water, restitution of vessel and cargo will be decreed. *Ibid.*

8. If under all the circumstances, the court is satisfied that the captain had reasonable ground for supposing that a vessel once warned off, returned to the blockaded port, with the intention of violating the blockade, all costs and necessary expenses will be allowed to the captain before the vessel is finally restored. The costs and expenses will be paid by the master of the vessel, as the agent of her owners. The master not being *de jure* the agent of the owners of the cargo, the latter will not be responsible for the consequences of his costs. *Ibid.*

9. A violation of a blockade rigorously enforced, is a good ground for the seizure and condemnation of both vessel and cargo. *The Bark Coosa* ada. *Commodore Conner*, 393

10. To constitute a violation of blockade, three things must be proven; 1st. The existence of the blockade; 2d. The knowledge of the party supposed to have offended; and 3d. Some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade. *Ibid.*

BOTTOMRY BOND.

1. Where A., the master of a brig, puts into a foreign port by reason of a leak, and then borrows money from B., and draws a bill of exchange upon C., which bill is unpaid at maturity, and at the same time that the bill is drawn, he also executes a mortgage or hypothecation, in which there is a special stipulation, that B. is not to take the usual marine risks in case of bottomry and hypothecation, neither instrument establishes a lien upon the brig, which can be enforced in the admiralty, for want of jurisdiction. *The Brig Atlantic*, 514

2. The essential difference between a bottomry bond and a simple loan is, that on the latter the money is at the risk of the borrower, and must be paid at all events: in the former it is at the risk of the lender during the voyage, and the right to demand payment depends upon the safe arrival of the vessel. *Ibid.*

3. Admiralty cannot enforce a claim for money which has been advanced on

the personal credit of the vessel, owner or master, in a suit *in rem*. Ibid.

4. Where a bill is drawn, and a bottomry bond taken for the same sum, the bill must share the fate of the bond. Ibid.

BURDEN OF PROOF.

1. Where a cargo is received on board a ship in good order, and on delivery it is found in bad order, the *onus probandi* is upon the master of the vessel to show it was not through his fault or negligence the injury was sustained. *The Bark Oregon* *ads. Rodocanachi et al.*, 504

2. Where loss or damage happen to goods while in the possession of a common carrier, the *onus probandi* is on the carrier to exempt himself from liability; for *prima facie* the law imposes upon him the obligation of safety. *The Brig May Queen* *ads. Merriman*, 464

3. In cases where the carrier has given notice qualifying or limiting his liability, the burden of proof of negligence is on the shipper, not of diligence on the carrier. This is contrary to the general rule where there is no notice. Ibid.

4. Several casks of hardware were shipped from Ogdensburgh, N. Y., to Chicago, by bill of lading, to be delivered in good order, dangers of navigation excepted; the goods being found damaged at Chicago, it devolves upon the carrier to prove that it was within the exception of the bill of lading. *The Propeller Cleveland* *ads. Hunt*, 221

5. Facts having been proved from which this could be fairly inferred, it devolves upon the shipper to prove that the damage could have been prevented by the exercise of reasonable care and skill on the part of the carrier. And it must not be a matter of doubt, but it must clearly appear, that there was negligence or want of skill on the part of the vessel. Ibid.

6. It once being established in a collision case that the libellant's vessel displayed the wrong light, it rests upon him to show that the loss was not in consequence of it. *The Schooner Miranda* *ads. Foster*, 227

C

CANALS.

See NAVIGATION, 5.

CHARTER PARTY.

1. There are two kinds of contracts passing under the general name of charter party, differing very widely from each other in their nature, their provisions, and in their legal effects. In one, the owner lets the use of the ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. In the other, the vessel is let to hire and the charterer takes her into his own possession, and has not only the use but the entire control of her. He becomes the owner during the term of the contract. *Exmes v. Chas. Oavaroc & Co.*, 528

2. Where the general owner retains the possession and command of the ship, and contracts to carry the cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership. Ibid.

3. Where the master complies with the stipulation in the charter party which requires the delivery of the cargo to the holders of the bills of lading as a condition precedent to his receiving the freight, he loses his lien on the cargo; and his recourse for compensation is against the consignees, as the representatives of the charterers. Ibid.

4. Independently of the charter party the ship is bound for the merchandise, and the master is bound to transport and deliver the cargo according to the terms of the bills of lading, and is responsible for any damage the cargo may have sustained. Ibid.

5. The stipulation in the charter party which imposes upon the consignees of the charterers, the duty of collecting the freight, makes it their duty necessarily to ascertain the reasons why payment is withheld by the holders of the bills of lading. Ibid.

COLORED PERSON.

1. The United States district attorney filed a libel *in rem* against the bark Ohio, to have her declared forfeited, for having brought into the United States a colored person from a foreign port or place, in violation of the 1st section of the act of Congress of the 20th April, 1818 3 Statutes at Large, 430. *The Bark Ohio* *ads. The United States*, 409

2. The provisions of this act were not intended to apply to a case where a colored person, born and reared within the United States, sails to a foreign port or place on board of an American ship and returns to a port of the United States.

Ibid.

3. And where it appears from evidence, that the negro boy came on board of the vessel in the port of Baltimore in the capacity of a servant, and that he had for several years resided in New Jersey or New York, in the family of the master of the ship, the presumption is that he was free, notwithstanding the declaration of the custom officer, that the master claimed him as his slave.

Ibid.

4. In no event can this libel *in rem* for a forfeiture, be sustained, since it does not appear from evidence, that the master, even if he brought the colored boy in question from a foreign port or place, did so on board this particular vessel. Ibid.

COLLISION.

1. If a steamboat, while extricating another steamboat from her perilous situation, during the excitement and confusion incident to a threatened conflagration, should unavoidably injure the latter, she will not be held responsible for the injury; and a reconventional demand in the nature of a cross libel, claiming compensation for such an injury, will be dismissed. *The Steamboats S. W. Downs and Storm* ad. *Stevens*, 458

2. Whether the libellant, in taking a position for his flat-boat at the landing, did so voluntarily or in accordance with the orders of the proper officer having a supervisory control over his actions, is not material. If he brought himself within the pale and under the protection of the local regulations, he was in his proper position; and the attempt of a steamboat to land there, must be considered an intrusion. *The Steamer Southern Belle* ad. *Culbertson*, 461

3. Precaution and vigilance on the part of the officers of vessels propelled by steam, should be increased in proportion to the difficulties of navigation in particular localities, and in proportion to the dangers of collisions to which they are liable to expose the property of others.

Ibid.

4. There is no general rule of navigation

on the Mississippi more generally observed by pilots of steamboats than that which requires the descending boat to run down the bend where she finds the strongest current and the deepest water, and the ascending boat to hug the bar as close as she can with safety, in order to avoid the resistance of the current. *The Georgia and Dresden*, 474

5. Where it appears that two steamboats were meeting on the Mississippi river, and the pilot of the ascending boat gave the signal of two taps of his bell, thereby indicating his determination to steer to the larboard in order to take the bar shore, and the signal was answered by the pilot of the descending boat also with two taps, thereby indicating his acquiescence in the propriety of the signal, it was the duty of the latter promptly to steer to the larboard in order to avoid a collision. Ibid.

6. The rule 3d of the rules and regulations adopted by the board of supervising inspectors in compliance with the requisitions of the act of Congress approved 30th of August, 1852, purports to be a rule to regulate the movements of steamboats meeting *in fogs and narrow channels*. The term *narrow channel* is absurd when applied to that of the Mississippi river at any stage of water or at any point below the mouth of the Ohio, and the term as used in the rule doubtless refers to the channels of the *shoots*, so called by rivermen, which running off from the main river form islands by falling into it again. Ibid.

7. Where two steamboats are meeting on the Mississippi river and there is danger of collision, it is the duty of the descending boat as a general rule to ring her bell and shut off her steam, and it is the duty of the ascending boat to do the maneuvering. Ibid.

8. The general rules of navigation of the Mississippi and the law of Louisiana require a descending steamboat to keep the middle of the river. *The Steamboats Pearl and Natchez*, 489

9. Although a steamboat descending when near a bend, may have the right to run near the right bank, yet she is guilty of great imprudence in continuing to run near that shore, when she saw another boat ascending, apparently near the same shore. Ibid.

10. When a boat ascending on the right

bank, signals a boat descending, by two taps on her bell, that she intends keeping to the larboard, there is no necessity that the descending boat should run any risk in passing. Ibid.

11. Where it appeared, that while the libellant's schooner and a bark were in tow of a tow-boat, both vessels being astern of the tow-boat, the schooner by some mismanagement, ran in before the bow of the bark, broke her own hawser, capsized and immediately sunk; and it further appeared that the cause of the disaster was the *shortness of the hawser* of the schooner, and the refusal of those in charge of her "to pay it out," in obedience to the orders of the master of the tow-boat; *Held*, That neither the tow-boat or the bark were to blame. *The Steamboat Anglo Norman and Bark Jane E. Williams* ads. *Martinez*, 492

12. In a collision between two vessels, where it appears that one of them has neglected an ordinary and proper measure of precaution, the burden is on her to show that the collision was not owing to her neglect, but would have equally happened, if she had performed her duty. Ibid.

13. A ferry boat running in a certain track across a river and compelled to make a certain number of trips within an hour, is not excused from taking ordinary precautions to avoid collision with a steamship. *The Steamship United States* ads. *Randolph*, 497

14. Nor is a steamship although the more powerful vessel, bound under such circumstances to steer clear of the ferry boat. Ibid.

15. A party who comes into a court of admiralty to seek relief in a case of collision, should show, that all proper care, skill and prudence has been observed on board of his own vessel, to prevent the disaster of which he complains. Ibid.

16. The maritime law is rigid in its exactions of unremitting care and vigilance on the part of those intrusted with the navigation and safe keeping of vessels of every kind, to avoid accidents and injuries by collision. Any negligence, inattention or want of skill, resulting in injury to others, will entitle the sufferer to remuneration. *The Propeller Ogdensburgh* ads. *Ward et al.*, 139

17. See LOOK-OUT, 1, 2. Ibid.

18. In general, it is the duty of vessels,
VOL. I. 36

whether propelled by steam or wind when meeting dead ahead, or nearly so to port helm, and each turn to the right. But if they are passing with berth enough to exclude the possibility of their coming together, each pursuing their onward course, they are not required to port their helm. Porting the helm under such circumstances may be a fault. Ibid.

19. When steam vessels are approaching each other, and from the darkness or fog, there is uncertainty as to the course and position of the other, it is the duty of each instantly to check the speed, and then, if necessary, to stop and back. Ibid.

20. A libellant claiming damages on the ground of a collision with another boat, must make it appear that there was no want of ordinary care and skill, in the management of his boat, and that the injury for which he claims compensation, resulted from the sole fault of the other boat. But the faulty management of one boat, will not excuse the want of proper care and skill in the other. *The Steamboat Swann* ads. *Lucas et al.*, 158

21. A case of damage resulting from inevitable accident, is defined to be "that which a party charged with the offence could not possibly prevent, by the exercise of ordinary care, caution and skill." Ibid.

22. There is no ground in this case for the conclusion that the injury was unavoidable; but on the contrary, it is a case of mixed or mutual fault. Ibid.

23. But to constitute a proper basis for a decree apportioning the damages equally to each boat, as in a case of mixed or mutual fault, the evidence must enable the court to find the specific faults of each, from which the injury resulted. Ibid.

24. If the court is satisfied that both boats were in fault, and yet, from the conflict in the evidence, cannot find, with reasonable certainty, the specific faults of each, it constitutes a case of inscrutable fault; and, in such case, in accordance with the law as settled in the United States, a decree for the equal apportionment of the damages resulting from the injury may be entered. Ibid.

25. The present is adjudged to be such a case, and a decree is entered in accordance with the principle stated. Ibid.

26. In case of a collision between a steamer and sail vessel, in which the owners of the former libel the latter, the libelants must not only show fault in the said vessel, but all precautionary measures on their own part to avoid the danger to which she was exposed. *The Brig Fashion* ads. *Ward*, 8
27. Where a collision is deemed inevitable, an injudicious order, given in the excitement and alarm of the moment, is not to be considered the only cause, even if deemed a fault, should the antecedent negligence and conduct of the one party have placed the other in a situation where there was no time for judicious action. *Ibid.*
28. Where no fault can be found on either side, the collision will be deemed an inevitable accident. *Ibid.*
29. Where a collision occurs from inevitable accident, without the negligence or fault of either party, each should bear his own loss. *Ibid.*
30. Since the introduction of steam in the propulsion of vessels, the rule of navigation has been enlarged, and steamers are required to use all their power and care, under all circumstances, to keep clear of sailing vessels. The former can be controlled and guided by human skill, the latter are governed by the wind. *Ibid.*
31. Every precaution must be taken by a steamer to avoid a collision with a sail vessel, and the timely slackening of her speed is a necessary precaution at night, when passing through a fleet of sail vessels anchored at the mouth of a river. Under such circumstances, a mere conformity with the rules of navigation will not excuse the steamer. *Ibid.*
32. A rate of speed in steamers, which under the circumstances, necessarily endangers the property of others, is unjustifiable, and makes the owners responsible for the consequences. *Ibid.*
33. In a case of collision between a steamer and a sail vessel, the former is not to be presumed to be in fault merely because, as a steamer, she has control over her own movements. *Ibid.*
34. Steamers are to be treated as sailing with a fair wind, and bound to give way to a vessel close hauled. *Ibid.*
35. Where a collision has occurred between a steamer and a sail vessel, and the evidence shows that the steamer was in her regular course, and adopted all the usual precautions to avoid the collision, the sail vessel having a fair wind, and the facts proved being inconsistent with the supposition of requisite care on the part of the vessel, the court will presume the latter to have been in fault. *Ibid.*
36. The rule is well settled, that a sailing vessel must keep her course in approaching a steam vessel, and the latter must keep out of the way of the former. *The Propeller Buffalo* ads. *Hall*, 115
37. In collision cases, the master of the vessel whose situation is described, while standing upon the deck of his own vessel, has a more eligible situation for reliable observation, than a witness upon the approaching vessel. *Ibid.*
38. Where a propeller was descending the River St. Clair, in a night so dark that objects could be seen but a short distance, at a speed of eight miles an hour, and had discovered below her the lights of a number of vessels; *Held*, that she was in fault for not slackening her speed until she had passed. *Ibid.*
39. In collision cases, witnesses observing passing events from different positions, cannot be expected to agree, as to locality of objects, or the relative change of position; much more must this be the case where the one making the observation is under rapid motion. *Ibid.*
40. A vessel when beating down the river, need not "heave in stays" in meeting a steamboat. It is the duty of the steamer to avoid the vessel. *The Pearl* ads. *McKee*, 129
41. A steamer, in entering the harbor of Chicago in the night, at a speed of three and a half to four miles an hour, while another steamer was in the act of turning, just above the bend of the river, came in collision with the latter, at that moment lying across the river; *Held*, The former was in fault, and was liable for the damages done. The river was full of craft, and the speed of the steamer was too great under the circumstances. *The A. Roestler* ads. *Ward*, 225
42. If a steamer, owing to any cause, cannot see its way clear before it, in entering a harbor in the night, it is its duty to proceed with extreme caution, or to stop. *Ibid.*

43. In a collision which took place between a steamer and a schooner as they were entering the harbor of Chicago, the evidence shows that the schooner was ahead and was sailing the channel usually taken by vessels when the wind was from the direction it then was, and that the steamer attempted to pass, in a narrow space, between the schooner and the pier, without any considerable abatement of speed. This was a fault, and under the circumstances the steamer cannot maintain a libel for the injury done by the collision. The steamer should have allowed the schooner to continue her course without interruption, and if necessary should have stopped. *The Schooner M. Dousman* ads. *Ward*, 236

44. When it appears in a case of collision, one party is in fault, before a court of admiralty will allow any compensation by apportionment or otherwise to such party, the evidence must clearly show there was a fault on the other side. If it is conflicting, so as to leave it doubtful, or if it should appear that there might be some slight mistake or error which was occasioned by the original flagrant fault of the first named, no apportionment will be made. *Ibid.*

45. Whenever a sail vessel is entering upon difficult navigation, as approaching a harbor, &c., a steamer following should take extreme precaution to keep out of the way. A steamer is considered under command, and should avoid sail vessels; and this rule is to be enforced with peculiar strictness under the circumstances of this case. *Ibid.*

46. A vessel on the starboard tack, must show a red light, having the wind free, a white light. *Sailing vessels* as well as propellers and steamers must have reflectors to their lights, and must be such as to insure a good and sufficient light. *The Schooner Miranda* ads. *Foster*, 227

47. In a collision between a brig and schooner, the brig being close hauled on the starboard tack, had a white light. This was in violation of the act of Congress and was such a fault as to preclude the brig from recovering full indemnity for the damage done by the collision, which occurred while the brig carried such light. *Ibid.*

48. The act of 1849 did not intend to abrogate the rules which have been generally observed for the management of vessels: it only added a new one. But

it once being established that the brig had the wrong light, the burden of proving that the loss was not in consequence of it, is thrown upon the brig. The schooner had no proper look-out; and should have "kept away" and not held on her course. It cannot be said, therefore, within the meaning of the act of 1849, that the loss resulted entirely from the neglect of the brig to carry the proper light. *Ibid.*

49. Both vessels were in fault, the loss was equally divided between them. *Ibid.*

50. Where it appears that a steamboat was moored at the bank of the river in her proper place and out of the track of vessels ascending and descending the stream, and she is injured by a collision with one of two boats ascending, her owner is entitled to damages; and the only question for the decision of the court is, from which of the boats is he entitled to recover? *The Steamboats Bella Donna and Louisa*, 510

51. Where two steamboats are ascending the river side by side, and a collision occurs, a very clear case should be made out to justify the court in giving judgment against the boat running next to the shore, when it is shown that she was as near thereto as prudence would dictate. *Ibid.*

52. In such a case the outer boat having the whole width of the river for a channel, must show beyond a reasonable doubt that, as the swifter boat of the two, she took all proper precautions to pass the other at a suitable distance; otherwise she will be responsible for the damage arising from a collision with a steamboat moored at the shore. *Ibid.*

COMMON CARRIERS.

1. Where on board of a passenger steamer, time and opportunity are given for a thief without detection to enter a state room of the ladies' cabin, which was properly fastened, and steal a valise; it was held, that it exhibited a want of care and watchfulness, on the part of those managing the steamboat, which should always be observed in the police regulations of such a boat. *The Steamer H. M. Wright* ads. *Walsh*, 494

2. Those engaged in running passenger steamers are required to use such a degree of vigilance, as will effectually protect from all intrusion, during the night time at least, that portion of the boat

which is appropriated for the security and convenience of helpless females. Ibid.

3. Common carriers of passengers are liable for the safe transportation of passenger baggage. Ibid.

4. Articles which it is usual for persons to carry with them from necessity or convenience or amusement, fall within the term baggage, as also money not exceeding a reasonable amount. Ibid.

5. A gold watch and gold spectacles were in this case necessary for the traveler's personal convenience. Ibid.

6. See JURISDICTION. Ibid.

7. Where a cargo is received on board a ship in good order, and on delivery it is found in bad order, the *onus probandi* is upon the master of the vessel to show it was not through his fault the injury was sustained. *The Bark Oregon* ada. *Rodocanachi*, 504

8. See PRACTICE, 6. Ibid.

9. In view of all the facts within his knowledge, the master of a vessel will be justified, if in the exercise of a sound discretion he pursues the course he deemed most expedient for the benefit of all concerned. Ibid.

10. A common carrier may qualify his liability by a general notice to all, of any reasonable requisition to be observed, as to the manner of delivery, entry of parcels, information of contents, rates of freight, and the like. *The May Queen* ada. *Merriman*, 464

11. A common carrier cannot, by a general notice, limit, restrict or avoid the responsibility devolved on him by the common law, or the salutary grounds of public policy. Ibid.

12. It may, however, be limited or restricted by an express agreement between the parties; but he cannot do so by any act of his own. It requires the assent of the parties concerned; and this is not to be inferred or implied from a general notice to the public; nor is it to depend upon doubtful or conflicting evidence, but it should be specific and certain, leaving no room for controversy between the parties. Ibid.

13. See BURDEN OF PROOF, 2, 3. Ibid.

14. Where a bill of lading had stamped upon it "Goods to be receipted for on the levee—not responsible for rust, breakage, leakage, cooperage—weight and contents unknown," and the witness who received the goods stated "that the vessel would not be responsible for breakage," this is not such a certain and specific contract as is required to free the carrier from liability. Ibid.

15. Where an individual residing in Philadelphia was employed by a firm in Memphis, Tennessee, to construct glass cases, and from abundant caution superintended their shipment, he is in no legal or just sense the shipper, nor could he bind the owner by any contract he might enter into of so important a character as would exempt the vessel from the usual and well established responsibilities of a common carrier. Ibid.

16. But even if an express agreement has been entered into, limiting the responsibility of the carrier, such a contract could not be pleaded as an exemption from liability for any loss or damage resulting from gross negligence or misfeasance of the master or his servants. Ibid.

17. Where the officers of a vessel knew perfectly well the contents of certain boxes to be glass cases, a failure to observe every precaution necessary to insure their safe stowage and safe delivery must be held gross negligence. Ibid.

18. It is part of the obligation of a common carrier to deliver the property placed in his charge within a reasonable time, but what is a reasonable time, depends upon the circumstances of the case. *Broadwell v. Butler et al*, 171

19. The words "privilege of reshipping," in a bill of lading, are intended for the benefit of the carrier, but do not limit his responsibility. Ibid.

20. If he undertakes to deliver goods within a specified time, he is liable for any delay beyond that time, unless the cause of the delay is within the exception in the bill of lading, or occasioned by the act of God, or the public enemy. Ibid.

21. The subsidence of the water in the Ohio river, preventing a boat from passing up the falls with its cargo, is not strictly within any of the reasons which excuse a carrier for the failure to deliver goods within a reasonable time. Ibid.

22. See USAGE, 1 and 2.

Ibid.

23. Several casks of hardware were shipped from Ogdensburg, N. Y., to Chicago, by bill of lading to be delivered in good order, dangers of navigation excepted; the goods being found damaged at Chicago, it devolves upon the carrier to prove that it was within the exception of the bill of lading. *The Propeller Cleveland* ads. *Hunt*, 221

24. Facts having been shown from which this could be fairly inferred, it devolves upon the shipper to prove that the damage could have been prevented by the exercise of reasonable care and skill on the part of the carrier. And it must not be a matter of doubt, but it must clearly appear that there was negligence or want of skill on the part of the vessel. Ibid.

25. In general the responsibility of a vessel for safe carriage and safe delivery of property attaches upon its safe delivery to them. Ibid.

See BILL OF LADING. *The Ship Norman*, 525
See RECEIPT, 1, 2. *The Arrow*, 59

COMMANDER OF FRIGATE.

See LICENSE, 1, 2. *The Amado*, 400

COMMERCE.

1. If commerce is completely internal confined to one state, Congress has no power over it. *The Steamboat James Morrison* ads. *The United States*, 241

2. The act of Congress of July 7, 1838, "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," is founded upon article 1 (sec. 8, clause 5) of the constitution, giving Congress power "To regulate commerce with foreign nations and among the several states." Ibid.

3. The phrase "coasting trade," cannot be applied to ferrying across a river. Ibid.

COMPROMISE.

See SALVAGE, 6. *The Ship Charles*, 829
See PROCTOR, 1. *The Ship Cabot*, 348

CONFISCATION.

See ENEMY'S PROPERTY, 1, 2, 3. *The Juanita*, 352
See BLOCKADE, 2. *The Nayada*, 366
See ENEMY'S PROPERTY, 5. *The El Telegrafo*, 383
See BLOCKADE, 9. *The Bark Coosa*, 393
See ENEMY'S PROPERTY, 8. *The Schooner Amado*, 400

CONSUL.

See MANDATORIES, 2. *The Amado*, 400
See LICENSE, 2. Ibid.

CONTRACT.

See SALVAGE, 11. *The Ship John Taylor*, 341
See RECEIPT, 1, 2. *The Steamer Arrow*, 59

1. Where a vessel of the United States is duly enrolled and licensed and has been engaged for years between Detroit and Buffalo, although she may have been for a short time at a foreign port, still the presumption is that her crew were hired in a domestic port. *The F. W. Backus* ads. *Franconet*, 1

CONTRACT OF AFFREIGHTMENT.

1. Where a person in possession of a vessel under a contract for the purchase, refuses to fulfill his contract, it does not render his possession *tortious*, especially as to third parties. *The Schooner Julia Smith* ads. *Jackson et al.*, 61

2. A contract of affreightment, made by the person in possession, or his agent, under such circumstances, is binding upon the vessel. Ostensible ownership and present possession and authority are sufficient to give one a right to bind the ship. Ibid.

3. Where goods regularly shipped are not delivered according to the contract, the carrier is bound to make good to the shipper the actual loss he has sustained. The measure of damages here, is the value of the cargo when shipped, with interest. Ibid.

4. Where the general owner retains the possession and command of the ship,

and contracts to carry the cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. *Eames v. Charles Cavaroc & Co.*, 528

COSTS.

1. A suit by a proctor in the admiralty for his costs or fees, is a familiar proceeding in the admiralty tribunals both in this country and in England. *The Ship Cabot ada. McDonald*, 348

2. Where wages due from a master to the seamen, are seized under a process of garnishment from a local court in the hands of the latter, at the very time that a suit for a penalty and wages brought by those seamen against the master, is pending in the United States District Court sitting as a court of admiralty, it is the duty of the master not to pay over the money before the expiration of the legal delay for the return of the garnishment, without the knowledge of the proctors in the admiralty suit. A payment under such circumstances will render the master responsible for the costs of the opposing proctor, if the latter has thus been prevented from receiving them from his own clients in the ordinary way. *Ibid.*

See BLOCKADE, 8.

3. Where a suit is prosecuted in whole or in part for the use of an informer, the United States cannot be liable for costs mentioned in the 8th section of act of February, 1799. But the informer is, and the court may compel him to give security on pain of refusal. *The Steamboat Planter ada. The United States*, 262

4. Where a fair and liberal allowance as salvage is tendered to the libelants or their proctors, the court will be bound to decree costs against the libelants, to be paid out of their distributive share. *The Steamboat Edward Howard*, 522

5. That portion of the 1st section of the act of Congress regulating the fees and costs of the clerks, marshals and attorneys of the circuit and district courts of the United States, which provides that "in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent. on the first five hundred dollars of the claim or de-

cree, and one-half of one per cent. on the excess over five hundred dollars," should not be so construed as to give the marshal a right to exact said commission in a case where the claim of the libelant has been settled before any claimant of the property libeled appears in court. *The Steamer Norma*, 533

6. The law did not intend to confer a gratuity upon the marshal; it contemplated the presence of both the parties litigant in court, and the whole progress of the litigation short of the sale under the final decree; or, the possession of the property by the marshal, and the usual proceedings under an interlocutory order of sale, without the sale itself. *Ibid.*

CROSS LIBEL.

See LIBEL.

CUSTOM.

See USAGE.

D

DAMAGES.

1. Where goods regularly shipped are not delivered according to the contract, the carrier is bound to make good to the shipper the actual loss he has sustained. The measure of damages here, is the value of the goods when shipped, with interest. *The Schooner Julia Smith ada. Jackson*, 61

2. The court refuse to give the libelant his expenses coming to Detroit to hunt up the property, or expenses incurred in defending the suit in court. *Ibid.*

3. Where it was shown by the bill of lading and the testimony of the shippers that a cargo of coffee was in good order when it left the port of Boston, and it was proven to be in a damaged state when it reached the consignees in New Orleans, the necessary conclusion must be that the damage was caused while it was on board the ship. *The Ship Norma*, 525

4. The coffee having been reshipped in its damaged state to the owners in St. Louis, and subjected to an examination there, the report of the witnesses who made that examination may be relied on in ascertaining the extent of the damage in the quality of the coffee, when it arrived at its ultimate destination; and it

may also serve as a fair criterion in fixing the amount of damage it had sustained when it was received at this port. *Ibid.*

See CHARTER PARTY. *Eames v. Cavaroc & Co.*, 528

See EVIDENCE.

Ibid.

See ALSO UNDER THE DIFFERENT APPROPRIATE HEADS.

DECLARATIONS.

See EVIDENCE. *Eames v. Cavaroc & Co.*, 528

DECREE.

1. A decree in admiralty is the judgment of the court on the subject in controversy, submitted by the pleadings, and must correspond with, and apply to that issue. *The Brig Fashion* *ads. Ward*, 41

2. The opinion of the judge on collateral matters, not involved in the record, is not to be incorporated in the judgment of the court. *Ibid.*

3. When a recovery in damages is sought in cases of collision between two vessels, and the proof exhibits faults in both, or no fault in either, and the libel is therefore dismissed, the decree need not set forth the ground assumed by the court, unless the pleadings presented such issue. *Ibid.*

4. Especially will such course be avoided in framing the decree, if the court is apprised, that the same matter is litigated between the parties in another district. *Ibid.*

DEFINITION OF NAUTICAL TERMS.

See NAVIGATION.

DEPOSITIONS.

1. An *ex parte* deposition taken under the act of Congress *de bene esse*, will not be received unless all the provisions of the act be strictly followed. *The Schooner Merritt Hunt* *ads. Luther et al.*, 4

2. Where the officer taking the deposition *ex parte* did not certify that the witness was "cautioned," as well as "carefully examined and sworn," as provided by the act, the deposition will not be received. *Ibid.*

See EVIDENCE.

DERELICT.

1. Where a vessel is found entirely deserted or abandoned at sea, she is in the sense of the maritime law, a derelict. *The Ship Charles* *ads. Evans et al.*, 329

2. It has been customary to award a moiety in cases of derelict; but the rule is by no means inflexible, and courts of admiralty both in England and America have been governed in their decrees by the peculiar circumstances of each particular case. *Ibid.*

3. To constitute a derelict in the sense of the maritime law it is necessary that the thing be found deserted or abandoned upon the seas, whether the abandonment arose from accident, necessity or voluntary dereliction. *The Steamboat T. P. Leathers* *ads. Montgomery*, 421

4. The abandonment of a steamboat by the master to the care and protection of the master and crew of another steamboat for the purpose of procuring assistance and safety, is not a case of derelict. *Ibid.*

5. Where a part of the crew of a vessel at sea are dead and all the rest physically and mentally incapable of providing for their own safety, this is not what is known as derelict, but *quasi* derelict in the admiralty. *The Bark Nicholas* *ads. Sturtevant*, 449

See SALVAGE. *The Ship Charles*, 329

DETROIT, CITY OF.

1. Whatever authority the city of Detroit, as a corporation, possessed over the premises in question (a wharf at the foot of a public street), to dispose of or lease them, must be derived from the statutes of the United States. *The Brig Empire State*, 541

2. The "town of Detroit" was laid out into lots and streets, and public squares, &c., under the act of Congress of April 21, 1806, by the governor and judges; and on the 27th of April, 1807, they fully discharged their trust, and thus was Woodward avenue made a public highway, to the water's edge of Detroit river. *Ibid.*

3. By the act of 1842, "the lands" thus divided and remaining unappropriated under the act of 1806, were vested in the mayor, recorder and aldermen of the city of Detroit, to be disposed of by them, in their discretion. *Ibid.*

4. The city obtained no title whatever to the soil of the streets, the fee of which continues in the original dedicator, unless the purchasers of the lots bounded thereby be considered as having the fee, under their respective grants, and therefore cannot occupy them, or give authority to others to do so. *Ibid.*

5. Neither the governor and judges, as the old land board, nor their successors, the city authorities, as the new land board, have *now* any power, beyond that of the regulation of the streets and public squares; and this does not include the right to sell, or lease, or exercise any act of ownership. *Ibid.*

6. The city authorities may erect wharves at the termini of their streets, suitable for landing, but by so doing such erections become *free* to the public, as extensions of the streets, and the city has no authority to exact toll for ingress or egress. *Ibid.*

DEVIATION.

See INSURANCE, 1, 2, 3, 4. *The George Nicholas*, 449

DOCKAGE.

1. Dockage in a dry dock is in the nature of rent, and subject to the will of the proprietor of the dock. *Steamer Buckeye State* *ads. Ives*, 69

2. A printed tariff of charges at a dry dock not brought to the notice of the master or owner of a vessel taken into such dock for repairs, is not binding upon such master or owner. *Ibid.*

3. Where the proprietor of a dry dock charges twenty shillings per day for the labor of his men in repairing vessels taken into the dock, but only pays them eighteen shillings per day, the proprietor having also charged for his own time in superintending the men and their work, at the rate of \$4 per day; *Held*, that under the proofs of the case the extra two shillings per day on the men's time was an improper charge. *Ibid.*

DOMESTIC VESSELS.

1. A wharfinger's lien cannot be enforced in admiralty against a domestic vessel. *The Steamboat Asa R. Swift* *ads. Russel*, 558

2. Rule 12 of the Supreme Court only allows proceedings *in rem* in cases of domestic vessels "where by the local law a lien is given to material men for repairs, supplies or other necessities. *Ibid.*

DOMESTIC AND FOREIGN VESSELS.

1. The proof afforded by the enrollment, in a controversy, where the question is whether the vessel is foreign or domestic, will be held conclusive as to the character of the boat, unless contradicted by clear evidence of the notorious residence of the owner at a place or port other than that named in the enrollment. *The Steamboat Superior* *ads. Dudley et al.*, 176

2. When the owners of a boat reside at different ports, the vessel is to be considered a domestic vessel at the port where she is enrolled. *Ibid.*

3. See LIEN, 9, 10. *Ibid.*

4. The home port of a vessel, is the place where the law requires her to be registered, not necessarily the place where she was built. *The Charles Mears* *ads. Parmalee et al.*, 197

5. Whether a vessel is a domestic or a foreign vessel depends, subject to some modifications and exceptions, upon the residence of her owners, not upon the port of her enrollment. *The Golden Gate* *ads. Hill & Co.*, 308

See ENROLLMENT, 15. *Ibid.*

7. Where a steam propeller was built by ship builders at Cleveland, under a contract with parties resident of Buffalo, New York, *held*, that the former place was her home port until after her delivery and first voyage. *The Propeller Plymouth* *ads. Scott*, 56

See ENROLLMENT.

See MATERIAL MEN, 1. *The Samuel Strong*, 187

DOMICIL.

1. Where a Frenchman by birth had resided thirteen years in the republic of Mexico, it was *held*, that he had acquired a domicile in the enemy's country which subjected him, so far as it related to his property, to all the disabilities of an enemy. *The Schooner Amado* *ads. Lieut. Rogers*, 400

2. Time is the grand ingredient in constituting domicile; and in most cases it is unavoidably conclusive. The *animus manendi* is the point to be settled, and the presumption arising from actual residence in any place, is that the party is there *animus manendi*; and it lies upon him to remove the presumption, if it should be requisite for his safety.

Ibid.

See ENEMY'S PROPERTY, 4. *The El Telegrafo*, 383

See NEUTRALITY, 3. Ibid.

See INTERROGATORIES, 2. Ibid.

E

ENROLLMENT.

1. In a controversy, in which the question is, whether a steamboat was a foreign or domestic boat, at the time the account accrued, for which the libel is filed, the enrollment, made under oath by the managing owner, pursuant to the third section of the act of Congress, of the 31st December, 1792, requiring the enrollment to be made at the port nearest the residence of the owner, is *prima facie* evidence that the boat belonged to such port. *The Steamboat Superior* ad. *Dudley et al.*, 176

2. The proof afforded by the enrollment, in such a controversy, will be held conclusive as to the character of the boat, unless contradicted by clear evidence of the notorious residence of the owner or owners, at a place or port other than that named in the enrollment. Ibid.

3. Where the owners reside at different ports, the vessel is to be considered a domestic vessel at the port where she is enrolled. Ibid.

4. The presumption of the knowledge that a boat belongs to the port of its enrollment, as to those who furnish supplies or materials at that port, is strengthened by the fact that it bears on its stern, in conspicuous letters, as required by the act of Congress, the registered name of such boat, with the port to which it belongs, especially where the evidence is, that such boat made several trips weekly to and from such port. Ibid.

5. A distinction exists, in the navigation laws of the United States, between registered vessels and vessels enrolled and licensed for the coasting trade, as regards

penalties imposed. *The Steamer Forrester* ad. *The United States*, 21

6. On the transfer of a registered vessel to a citizen of the United States she must be registered anew, or she loses the privileges of an American vessel; but a different penalty is imposed by the enrolling act for a neglect to renew a license granted by virtue of that act. Ibid.

7. Where a vessel has been enrolled and licensed, and prior to the expiration of the time limited by the license is sold to a citizen of the United States, and continues running without a renewal of her license, she becomes liable to port fees and tonnage in every port at which she may arrive, the same as vessels not belonging to the United States; but the vessel does not thereby become denationalized. Ibid.

8. The existence of a custom under which purchasers of vessels previously enrolled and licensed have awaited the expiration of the time limited in the license before obtaining a renewal of the same, would not relieve such vessels from liability to the penalty provided by the enrolling act. Ibid.

9. Custom will not modify an act of Congress. Ibid.

10. The term "coasting trade" cannot be applied to ferrying across a river. *The Steamboat Jas. Morrison* ad. *The United States*, 241

11. The words, "coasting trade," mean the trade along the shore, and does not include the business of a ferry boat. *The Ferry Boat Wm. Pope* ad. *The United States*, 256

12. An enrollment and license, duly executed, does not require delivery to give it validity. *The Steamboat Planter* ad. *The United States*, 262

13. Where a license was duly executed, sealed, signed, dated and numbered, but not delivered until a month thereafter; *Held*, that it was a valid license from its date. Ibid.

14. The lien against a vessel, in favor of material men under the general maritime law of the United States, also depends upon the residence of her owners, not upon the port of her enrollment. *The Golden Gate* ad. *Hill & Conn.*, 308

15. See DOMESTIC AND FOREIGN VESSELS, 5. Ibid.

ENEMY'S PROPERTY.

1. Enemy property found within our territory on the breaking out of war, cannot be confiscated without an act of Congress authorizing such confiscation. *The Schooner Juanita*, 352

2. When war breaks out, the question, what shall be done with enemy property in our country? is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is one proper for the consideration of the legislative department of the government, not of the executive or judiciary. Ibid.

3. There being nothing in the act of Congress recognizing the existence of war between the United States and Mexico, which authorizes the confiscation of the property of the enemy found within our territory upon the breaking out of the war, the court has no power to confiscate such property. Ibid.

4. A person residing in the enemy's country long enough to acquire a domicile, is subject to all the disabilities of an enemy so far as relates to his property. *The Cargo of the Schooner El Telegrafo* ads. *The United States*, 383

5. A vessel sailing under the flag of the enemy is considered as enemy's property, and is liable to confiscation *jure belli*. Ibid.

6. A distinction may be drawn between the vessel sailing under the flag of the enemy, and her cargo belonging to a neutral; but if it appears that the neutral has by his residence in the enemy's country acquired a domicile there, his property will be considered as enemy's property. Ibid.

7. The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it; and condemnation to the captors is equally the fate of enemy's property, and of that found engaged in an anti-neutral trade. *The Bark Coosa* ads. *Commodore Conner*, 393

8. Where a Frenchman by birth, had

resided thirteen years in the republic of Mexico, it was held that he had acquired a domicile in the enemy's country, which subjected him, so far as it related to his property, to all the disabilities of an enemy, therefore a vessel with her cargo (both owned by him), found sailing under the flag of the enemy, was considered liable to seizure and condemnation as prize of war. *The Schooner Amado* ads. *Rogers and the United States*, 400

9. To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority. If delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who in legal language, are termed mandatories, or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. *The Schooner Amado* ads. *Lieutenant Rogers*, 400

EQUITABLE TITLE.

1. Where one has a mere equitable title without having possession under it; *Held*, that admiralty had no jurisdiction to sustain a libel for possession. *The Schooner Ives* ads. *Kynoch*, 206

See EXECUTIVE CONTRACT, 1. Ibid.

EVIDENCE.

See BLOCKADE, 5. *The Nayade*, 366
See INTERROGATORIES, 1, 2. *The El Telegrafo*, 383
See ENROLLMENT, 1, 2, 4. *The Superior*, 176

See USAGE, 1, 2. *Broadwell v. Butler*, 171

See DEPOSITIONS, 1, 2. *The London*, 6
See INTERROGATORIES, 3. *The L. B. Goldsmith*, 123

1. On application for a rehearing, held that declarations of witnesses as to distance in the night time, must be received with many grains of allowance. Conclusions drawn by witnesses as to objects discerned at a distance are uncertain. *The Georgia and Dresden*, 474

2. A protest cannot be received in our courts as evidence for the master or owner, but may be evidence against him and them. *The May Queen* ads. *Merriman*, 464

3. Allegations in pleadings are admissions by the pleader and need no proof, unless denied and put in issue, and as against the pleader will always be taken as matter conceded. *The Brig Fashion* ads. *Ward et al.*, 8

4. A witness swearing that he *thought* a particular order was given, and to his *belief* that it was obeyed, is not contradicted by testimony, positively averring that such an order was not given. *Ibid.*

5. See PROTEST, 2. *The Brig Fashion*, 8

6. A receipt being introduced as proof of a contract of affreightment, parol evidence was admitted to explain it. *The Steamer Arrow* ads. *Butler*, 59

7. A master, when upon a voyage, is the general agent of the owner, and his admissions and declarations as such, and within the scope of his authority are evidence against the principal. *The H. D. Bacon* ads. *Eade et al.*, 274

8. The absurd rule which prevails in chancery, that the answer of the defendant when responsive to the bill, is equal to two disinterested witnesses, or to one witness with other circumstances of equivalent force, does not prevail in the admiralty courts. *Ibid.*

9. Nor does the same rule prevail even where the answer is responsive to interrogatories propounded. *Ibid.*

10. A book of original entries, kept by the captain of the propeller, who was also part owner, is inadmissible to prove cash payments, there being no other proof of these payments. *The Propeller B. F. Bruce*, 529

11. The general declarations of the owners of damaged goods, unaccompanied by any specific statements of disinterested persons, showing the nature and extent of the damage, are entirely insufficient and will be rejected by the court. *Eames v. Cawaroc & Co.*, 528

EXECUTORY CONTRACT.

1. The contract in this case is an executory contract for the purchase of a vessel; conveying no legal title to the libellant, but simply investing him with an equitable interest. The Court of Admiralty will not hold an equitable title sufficient to justify its interposition against the

legal title to obtain possession, although it may sometimes decree such an equitable interest sufficient to restrain it from interference from an existing possession under it. *The Propeller S. C. Ives* ads. *Kinloch*, 205

F

FERRY BOAT.

1. A ferry boat running in a certain track across a river and compelled to make a certain number of trips within an hour, is not excused from taking ordinary precautions to avoid collision with a steamship. *The Steamship United States* and *The Belleville*, 497

2. A ferry boat is undoubtedly entitled to her rights and privileges, but they are to be enjoyed with a due regard to the rights and duties of others, and like all others navigating the port of a commercial city, is bound to be prepared for those occasions, which call for the exercise of prudence and skill. *Ibid.*

3. Congress has no authority to require a license to carry on a ferry over the Missouri river at a place entirely within the limits of the state of Missouri. *The Steamboat Jas. Morrison* ads. *The United States*, 241

4. There is no law previous to the act of July 7, 1838, requiring a ferry boat plying wholly within the limits of a state to obtain a license; nor does that act apply to such boats. *Ibid.*

5. Whether ferry boats plying between the United States and Canada would be required to obtain a license. *Quere?* *Ibid.*

6. The phrase "coasting trade" cannot be applied to ferrying across a river. *Ibid.*

7. The act of July 7th, 1838, "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, was not intended by Congress to apply to all steamboats, but only to such as before the passage of that act were required to be enrolled and licensed. *The Ferry Boat Wm. Pope* ads. *The United States*, 256

8. Under the laws of Congress prior to 1838, ferry boats were not required to be enrolled and licensed. *Ibid.*

9. A license from the United States and a license from a state are not both neces-

nary to authorize the owners of a steam-boat to employ her in ferrying. *Ibid.*

10. The laws of the United States contain no regulations for ferries as such; while the states have exercised the right to license and regulate ferries from the commencement of the government to this day. *Ibid.*

11. The words coasting trade means the trade along the shore, and the business of a ferry boat is not included therein. *Ibid.*

12. Where a steamboat, built for a ferry boat, used in her daily employment as such, and occasionally as a tug boat, was employed one day in making several trips from Detroit to Hamtramck, three miles distant, carrying passengers to the grounds of the state fair; *Held*, that such use did not change the ordinary character of the boat, or take her from the exception of the statute, or make her liable to the penalties of the act. *The Steamboat Ottawa*, 536

13. The 49th section of the act of Congress passed August 30th, 1852, cannot be so construed as to exclude boats or vessels ordinarily used as ferry or tug boats. *Ibid.*

FOREIGN VESSEL.

See DOMESTIC AND FOREIGN VESSEL.

FREIGHT.

See CONTRACT OF AFFREIGHTMENT.

FURTHER PROOF.

See INTERROGATORIES, 1, 2. *The El Tel-egrafo*, 383

G

GARNISHER.

See COSTS, 2. *The Ship Cabot*, 248

H

HIGHWAYS.

See STREETS AND NAVIGATION. *The Brig Empire State*, 541

I

IMPORTATION OF GOODS.

1. The laws of the United States in relation to commerce and revenue use the word "import" in its commercial sense. *The Forrester ada. The United States*, 81

2. The importation of merchandise into the United States implies bringing the goods and productions of other countries into the United States from a foreign jurisdiction. *Ibid.*

INFORMER.

See PENAL STATUTE.

INSURANCE.

1. When a vessel at sea meets with another, on board of which the greater part of the crew are dead, and the rest rendered entirely helpless by disease, it is the duty of the master of the first vessel to interrupt his voyage to take the necessary steps to preserve the lives of the sick, imposed by natural law and the commands of christianity. *The Bark George Nicholas ada. Starisvan*, 449

2. Such a stoppage or interruption is not such a deviation as would discharge any insurance or render the master civilly or criminally responsible for any subsequent disaster to his vessel. *Ibid.*

3. There is no obligation upon the master to lie by, or delay the progress of the voyage for the purpose of preserving property. This would discharge the underwriters from future responsibility. *Ibid.*

4. The maritime law and commercial usages do not prohibit the master from deviating under such circumstances, in the exercise of a sound discretion to save property that is imperiled. *Ibid.*

INTERROGATORIES.

1. The court will refuse an application for further proof, where the claim and test affidavit of the claimant are entirely at variance with his answers to the standing interrogatories. *The Cargo of Schooner El Telegrafo ada. The United States*, 383

2. The greatest solemnity is attached to examinations in preparatoria. *The*

standing interrogatories are of a searching character, and well calculated to elicit truth and detect fraud, and the reasons must be cogent indeed that would induce the court to deviate from the established practice, and permit a claimant, by further proof, to contradict his own declarations, made under the solemnity of an oath, touching a fact so important as domicile or national character. *Ibid.*

3. Answers to special interrogatories are considered as analogous to the decisory oath of the civil law, and are no more evidence for one party than the other, and will not be conclusive for either, where the weight of the other proofs in the case preponderates against the fact sworn to, or where, by self contradiction, suspicion attaches to the fidelity of the answers. *The L. B. Goldsmith*, 123

4. The chancery rule requiring two witnesses, &c., to overcome the answer of the defendant when responsive to the bill, does not obtain in admiralty, even with regard to answers to special interrogatories. *The H. D. Bacon* *ads. Eads et al.*, 274

J

JURISDICTION.

1. Since the decision of the Supreme Court of the United States, in the case of *The Genesee Chief v. Fitzhugh et al.*, 12 Howard, the admiralty jurisdiction has been considered as fully established on the Mississippi river, and all other rivers as far as they are navigable from the ocean, for vessels of ten or more tons burden. *The Barge Jenny Lind* *ads. Williams*, 443

2. The establishment of such a jurisdiction, necessarily carries with it all its incidents. Salvage services are as much the subject of admiralty jurisdiction, as damages arising from collisions or other maritime torts. *Ibid.*

3. Where the baggage of a passenger had been stolen from her room, on board a passenger steamer, the Admiralty Court has jurisdiction to entertain libel to recover its value. *The Steamboat H. M. Wright* *ads. Walsh*, 494

4. The admiralty jurisdiction of the District Court of the United States, extends to all the large, public navigable rivers and lakes of the United States.

The Ohio river is one of that class. *The Steamboat Pontiac* *ads. McGinnies*, 130

5. The jurisdiction of this court in cases of admiralty does not rest upon the statute of 1845, but upon the constitution of the United States. It is not limited to tide water, but embraces the lakes and navigable rivers through which commerce is carried on between different states or with a foreign nation. *The Propeller F. W. Backus* *ads. Franconet*, 1

6. Where a vessel of the United States is duly enrolled and licensed, and has been engaged for years between Detroit and Buffalo, although she may have been for a short time at a foreign port, still the presumption is that her crew were hired in a domestic port. *Ibid.*

7. At any stage of a proceeding in admiralty, until final hearing, the question of jurisdiction is open. *Ward v. Thompson*, 95

8. The district courts of the United States derive their jurisdiction from the constitution of the United States and the acts of Congress made in pursuance thereof. *The Young America* *ads. Scott*, 101

9. The second section of the third article of the constitution of the United States, which declares that the judicial power of the courts of the United States "shall extend to all cases of admiralty and maritime jurisdiction," embraces those subjects, whether of contract or tort, which, at the time the constitution was adopted, under the general maritime law, were the appropriate subjects of the jurisdiction of admiralty courts. *Ibid.*

10. The act of Congress of the 26th of February, 1845, did not enlarge the jurisdiction of the national courts as to questions of admiralty. *Ibid.*

11. A question of jurisdiction being a preliminary inquiry, it is proper that it should be brought to the consideration of the court at the earliest opportunity. *The Schooner Samuel Strong* *ads. Wick*, 187

12. The district courts of the United States have a general admiralty jurisdiction *in rem*, in suits brought by material men against foreign ships; and in cases of domestic ships where the local law gives a lien. *Ibid.*

13. The Court of Admiralty has no jurisdiction over executory contracts. *The Propeller S. C. Ives* *ads. Kynock*, 205

See EXECUTORY CONTRACTS, 1. Ibid.

15. Where one has a mere equitable title, without having possession under it, *held*, that admiralty had no jurisdiction to entertain a libel for possession. Ibid.

16. Courts of admiralty have no general jurisdiction to administer relief as courts of equity. They cannot entertain a libel for specific performance, to correct a mistake, to give relief against fraud, &c., 3 Mason, 16. Ibid.

17. The jurisdiction of the District Court of the United States, under the ninth section of the judiciary act of 1789, embraces all cases of a maritime nature, whether they be particularly of admiralty cognizance or not. They are not embarrassed by the restraining acts of Richard II and Henry IV, but are governed by the principles of maritime law recognized in maritime nations of continental Europe. Ibid.

18. When the general maritime law gives the mechanic or material man a lien for labor and materials, in the building of a vessel, the admiralty has jurisdiction to enforce it by a process *in rem*, even before the vessel is launched or employed in navigation. *The Propeller Charles Mears* ad. *Parmalee*, 197

19. When a libel is filed to enforce a lien against a vessel before she is actually employed in navigation, the libel must show that the vessel is of the size and build fitted for maritime employment, and that her business was to be maritime navigation upon the lakes or high seas. Ibid.

20. Independent of the act of 1845, extending the jurisdiction of the district courts upon the lakes, the maritime law has the same application to cases upon the lakes, as it has to those upon tide waters, both as to jurisdiction, and to forms of procedure and practice. Ibid.

21. Whatever are deemed material and sufficient averments in a libel upon the seaboard to give jurisdiction, would be considered the same upon the lakes, Ibid.

22. Admiralty jurisdiction extends to the lakes and navigable rivers of the United States; the same above as below tide water. *The Steamboat H. D. Bacon* ad. *Eads et al.*, 274

23. Under the judiciary act of 1789, the

courts of the United States have cognizance of all civil cases of admiralty and maritime jurisdiction, exclusive of the state courts, except as to the common law remedy. *The Golden Gate* ad. *Ashbrook*, 296

24. There is no concurrent jurisdiction *in rem* in admiralty cases between the courts of the United States and of the several states. Ibid.

25. The common law remedy existed before the constitution and act of 1789, and is by the latter *saved*, not *given*. It is a remedy by *action* at common law, not a proceeding *in rem*. A proceeding *in rem* is not a common law remedy. Ibid.

26. The admiralty and maritime jurisdiction of the United States *in rem*, is exclusively in their own courts. Ibid.

27. Where A., the master of a brig, puts into a foreign port by reason of a leak, and then borrows money from B., and draws a bill of exchange upon C., which bill is unpaid at maturity, and at the same time that the bill is drawn, he also executes a mortgage or hypothecation, in which there is a special stipulation, that B. is not to take the usual marine risks in case of bottomry and hypothecation, neither instrument establishes a lien upon the brig, which can be enforced in the admiralty, for want of jurisdiction. *The Brig Atlantic*, 514

28. Admiralty cannot enforce a claim for money which has been advanced on the personal credit of the vessel, owner or master, in a suit *in rem*. Ibid.

LACHES.

1. Where a party, applying to a court of admiralty to set aside a sale, is guilty of inexcusable laches in making his application, the motion will not be granted. *The Propeller Napoleon* ad. *Pease*, 37

2. As to whether there are circumstances or not, under which the court would set aside a regular sale in admiralty. *Quere?* Ibid.

3. Where the party applying to set aside a sale, knew of the institution of the suit before sale, knew of the sale within two weeks after it took place, and yet delayed making his application for nearly six months, his laches is inexcusable. Ibid.

4. Upon a motion to vacate an order *pro confesso*, and for leave to answer, the respondent must satisfactorily account for his laches, and exhibit by answer, or affidavit, a meritorious defence. *The Young America* ads. *Scott*, 107

5. Where the respondent is a foreign corporation and the respondent's agent and proctor residing in the district where the libel is filed, were not apprised of the facts upon which to base an answer until some months after the libel was filed, a motion to dismiss the libel for want of jurisdiction having in the meantime been filed, *held*, a satisfactory excuse for the respondent's laches. *Ibid.*

See LIMITATIONS, 1, 2, 3, 4, 5, 6, 7. *The Buckeye State*, 111

LEASE.

See WHARVES, 7. *The Brig Empire State*, 541

LIBEL.

1. Where by consent of parties the answer of the respondent stands as a cross libel, the court may if a proper case is made, decree full damages for the respondent against the libellant. *The Ogdensburgh* ads. *Ward et al.* 139

2. Where a libel is filed to enforce a lien upon a domestic vessel, it must be distinctly set forth in the libel, by what municipal regulation or state law, such lien is conferred. *The Propeller Chas. Mears* ads. *Parmalee et al.*, 197

3. When a libel is filed to enforce a lien under the general maritime law, such facts must be set forth in the libel, which, if proven, would satisfy the court, that the vessel was a foreign vessel at the time the lien attached. *Ibid.*

See JURISDICTION, 20, 21. *Ibid.*
See COLLISION, (as to cross libel). *The S. W. Downs and Storm*, 458

LIBEL FOR POSSESSION.

See POSSESSORY SUIT.

LICENSE.

1. No consul in any country, particu-

larly in an enemy's country, nor the commander of an American frigate, has any authority, by virtue of their official stations, to grant any license or permit which could have the legal effect of exempting the vessel of an enemy from capture and confiscation. *The Schooner Amado* ads. *Lieutenant Rogers*, 400

2. If there be anything in a license or permit granted by a consul, or a commander of an American frigate, to entitle a claimant to the equitable consideration of the government, it is to the executive or legislative department he must apply. A court of prize is governed by the laws of war, and can look only at the legal effect of such documents when introduced in evidence. *Ibid.*

LIEN.

1. The moment a boat was released upon a stipulation from the custody of the law, she was also released from the lien in favor of the original libellants, and they could only have recourse upon the stipulation. *Carroll & Adams v. The Steamboat T. P. Leathers*, 433

2. The claimant of a boat libeled for salvage upon giving a stipulation for her release from the custody of the law, takes her *cum onere*, subject to pre-existing liabilities. *Ibid.*

3. See SUBROGATION AND SURETY, 1, 2, 3. *Ibid.*

4. When supplies are furnished to a vessel in her home port, the validity of the lien must be determined by the local law; but when they have been furnished in a foreign port, or in the port of a state other than the one to which the vessel belongs, the liens are to be regarded as admiralty liens, which are unaffected by any limitations of the local law. *Ibid.*

5. If A. hold a lien against a vessel for materials furnished, and the master request B. to pay the account of A., the lien originally held by the latter is not by such payment transferred to B., and he has no right of action *in rem* in the admiralty. *Ibid.*

6. The assignment of a claim for salvage divests the lien originally existing in favor of the salvor, and confers no right upon the assignee to claim reimbursement in a court of admiralty. *The George Nicholas* ads. *Sturtevant*, 449

7. The lien for towage is also divested by an assignment of the claim. *Ibid.*
8. As to those claiming liens on this boat, as for supplies and materials furnished, proof that they gave credit to the boat, as of a port of another state, will not avail, unless they have used ordinary diligence to ascertain its true character, or fraudulent or unfair means have been used to mislead and deceive them, as to the place to which it belongs. *The Steamboat Superior* ads. *Dudley et al.*, 176
9. A claimant, having an original admiralty lien, who has proceeded under a state law, in a state court, to enforce it, will be deemed to have waived such original lien, and must rely solely on the lien acquired by the seizure under the state law. He cannot resume it at pleasure, and thus be reinstated to his original rights. *Ibid.*
10. For supplies furnished, or repairs made to a boat belonging to another state, there is an undoubted admiralty lien, equivalent to an hypothecation of the boat; but for repairs and supplies at the home port, there is no lien, unless given by the state law. *Ibid.*
11. It is competent for a state to provide such a lien, and the national admiralty courts will execute a state law for such a purpose; but state legislation cannot supersede or destroy a lien acquired by the general maritime law. *Ibid.*
12. A master of a boat or vessel has no lien for his wages as such. *Ibid.*
13. A lien for materials furnished to a vessel, may be waived either at the time the materials are furnished, or by a subsequent agreement on the part of the creditor. If the creditor agrees to look to other security, no lien attaches. *The Steamboat Fashion* ads. *Moore & Foote*, 49
14. See PROMISSORY NOTE, 1, 2. *Ibid.*
15. In cases of supplies and materials furnished to a vessel, the material man is not deprived of any of his remedies except upon the most conclusive proof that exclusive credit has been given to other security than the vessel, its owner, or master. *Ibid.*
16. Where a material man relies exclusively upon the credit of the master or owner for payment of his demand, no lien is created upon the vessel; but the lien having accrued, it will not be released except upon the clearest proof of the creditor's intention to release it. *Ibid.*
17. A state may by law create a maritime lien, unknown to the general maritime law, and may provide legal tribunals, and a mode of proceedings for the enforcement of such liens, other than proceedings *in rem*. *The Schooner John Richards* ads. *Riggs*, 73
18. Proceedings *in rem* are peculiar to admiralty courts. They are international and not municipal. *Ibid.*
19. Whenever municipal law appropriates the remedy *in rem* against vessels, it comes in direct conflict with the 2d section of the 3d article of the constitution of the United States. *Ibid.*
20. State legislatures have no power to divest a lien existing in admiralty. *Ibid.*
21. The possession of the vessel by the sheriff under state process, did not divest the lien in admiralty, or affect the process in the hands of the marshal. *Ibid.*
22. The District Courts of the United States have a general admiralty jurisdiction *in rem*, in suits brought by material men against foreign ships, and in cases of domestic ships when the local law gives a lien. *The Schooner Sam. Strong* ads. *Wick*, 187
23. The act of the legislature of Ohio entitled, "An act for the collection of claims against steamboats and other water crafts and authorizing proceedings against them by name," passed February 26th, 1840, and the act explanatory thereto, passed February 24th, 1848, does not create a lien; it only affords a remedy. *Ibid.*
24. The Supreme Court of the state of Ohio have decided that their water craft law does not create a lien. See 14 Ohio, 410. *Ibid.*
25. The maritime lien of seamen for their wages, and material men for supplies and repairs, is a species of proprietary interest in the ship or vessel itself, and which, except on payment, cannot be divested by the acts of the owner or by any casualty. *The tackle, &c. of The America* ads. *Bruce*, 195
26. Such lien adheres to the ship and

all its parts, wherever found, and whoever may be the owner. It attaches to the parts of a dismantled vessel the same as to a ship or vessel *in integra*. *Ibid.*

27. Wherever there is a maritime lien it may be enforced in the admiralty by a proceeding *in rem*. *Ibid.*

28. A lien against a vessel for labor and materials may be enforced before the vessel is launched. *The Propeller Chas. Mears* ads. *Parmales*, 197

29. See *LIBEL*, 2, 3. *Ibid.*

30. See *JURISDICTION*, 18, 19, 20, 21. *Ibid.*

31. Where a steamboat violated the second section, of act of July 7, 1838, but subsequent to such violation, was seized and sold under the Missouri "Boat and Vessel Act," by material men; *Held*, that the United States had no lien or claim, that could overreach the claim of the material men, who had now acquired title to the vessel. *The Steamboat Laurel* ads. *The United States*, 269

32. By said second section no forfeiture of the boat is declared, and no express lien given on the boat for the penalty, in case of a violation. *Ibid.*

33. The expression in the second section, "for which sum or sums the steamboat or vessel so engaged shall be liable," is simply used to give a remedy against the boat by name, and was not intended to give a lien expressed or implied. *Ibid.*

34. A lien exists for salvage services upon the property saved. *The H. D. Bacon* ads. *Euds et al.*, 274

35. Possession is not necessary to give validity to a lien. There is a difference between the right of retainer, and a lien. *Ibid.*

36. It requires the most unequivocal acts, on the part of the salvors, to show that they intend to abandon their lien, and resort to the owners for payment. *Ibid.*

37. The Missouri act "concerning boats and vessels, does not abrogate, displace or supersede any lien given by the general maritime law. *The Henrietta* ads. *Harris*, 284

38. Nor does a seizure and sale under that divest an admiralty lien. *Ibid.*

VOL. I.

39. The admiralty and maritime law of the United States, is of as much force in the United States as a statute. And the laws of the United States "are the supreme laws," and cannot be modified or affected by state enactments. *Ibid.*

40. No right or privilege given by the laws of the United States, can be abrogated, displaced or superseded by state enactments. A maritime lien is such a right. *Ibid.*

41. A state law declaring that a maritime lien should have no effect in that state, or should be postponed to liens given by the state laws, would have no binding force or effect. *Ibid.*

42. Where a material man has a lien upon a vessel under the general maritime law of the United States, he has a right to enforce that lien by a suit in the United States courts, although the vessel may have been subsequently seized and sold under the Missouri act concerning boats and vessels. *The Golden Gate* ads. *Ashbrook*, 296

43. Where a material man has no lien under the general maritime law, but has a lien under the state law, and the same law provides certain proceedings by which that lien may be divested, if those proceedings are had, his lien is divested, and he cannot sue in the United States court. *Ibid.*

44. The lien against a vessel in favor of a material man, under the general maritime law of the United States, also depends upon the residence of her owners, not upon the port of her enrollment. *The Golden Gate* ads. *Hill & Conn*, 308

45. See *OWNERS*, 3. *Ibid.*

46. Where a steamboat was owned in Indiana, enrolled in Kentucky, chartered by residents of St. Louis, Missouri, and contracted debts to residents of Missouri; *Held*, That under the general maritime law of the United States, the charterers and material men both residing in Missouri, there was no lien upon the vessel. *Ibid.*

47. A seaman's lien for wages, although he was a part owner of the vessel, is not divested by a sheriff's sale on a judgment against all the owners; but he may proceed to enforce his lien by libel. *The Steamboat Pilot No. 2* ads. *Foster*, 215

48. The Ohio boat and vessel law, so called, of 1840, gives no lien upon a vessel for repairs, and it has been so construed by the Supreme Court of Ohio. *The Propeller Plymouth* ads. *Scott*, 56

49. Where the master of the vessel complies with the stipulation in the charter party which requires the delivery of the cargo to the holders of the bills of lading as a condition precedent to his receiving the freight, he loses his lien on the cargo; and his recourse for compensation is against the consignees, as the representatives of the charterers. *Eames v. Chas. Cavaroc & Co.*, 528

50. A wharfinger's lien cannot be enforced in admiralty against a domestic vessel. *The Steamboat Asa R. Swift* ads. *Russell*, 553

51. A wharfinger is not a material man, but only a lessor, for the time being, of a part of his real estate to be used as moorage, and his lien cannot be enforced under rule 12 of the admiralty, against a domestic vessel. *Ibid.*

52. The lien of the wharfinger is only enforceable as a *common law* lien; if he part with his possession of the vessel, his lien ceases. *Ibid.*

See LIMITATIONS, 1, 7. *The Buckeye State*, 111

LIGHTS.

1. The act of 1849 provides that, sailing vessels "going off large" or "before the wind," must show a white light. Under this act, a vessel "under way," with the wind "abaft the beam," must show a white light. *The Propeller Buffalo* ads. *Hall*, 115

2. A vessel in nautical technicality is "going off large," when the wind blows from some point "abaft the beam," is going "before the wind," when the wind is "free," comes over the stern, and the yards of the ship are braced square across. *Ibid.*

3. The 5th section of the act of Congress of 3d March, 1849, required a vessel navigating the lakes in the night, while on the starboard tack, to show a red light, and a vessel having the wind free a white light. It also required *sailing vessels* to have reflectors to their lights, and that they should be such as to insure

a good and sufficient light, as well as *propellers and steamers*. *The Schooner Miranda* ads. *Foster*, 227

4. A brig close hauled on the starboard tack was showing a white light; *Held*, that she was in fault. *Ibid.*

5. The brig having the wrong light, the burden of proving that the collision was not in consequence thereof, is thrown upon her. *Ibid.*

LIMITATIONS.

1. The maritime lien confers upon material men and seamen, the right to enforce the same by a proceeding *in rem*. But this right is not without salutary restrictions, arising from, and demanded by, the interests of navigation. *The Steamer Buckeye State* ads. *Stillman et al.*, 111

2. The limitations prescribed by the common law do not apply to claims in admiralty without express statutory provisions, yet public policy requires that these liens should not be permitted to lay dormant, to the injury of third parties. *Ibid.*

3. No cognizance will be taken of tacit liens, where circumstances are presented, creating justly the presumption that the lien is waived, and that the creditor looks to other security than the vessel. *Ibid.*

4. Lapse of time alone is not enough to make a demand stale. *Ibid.*

5. The policy of the law is, that a maritime lien should not be protracted beyond a reasonable opportunity for its enforcement. *Ibid.*

6. Upon the northwestern lakes, where several voyages are made during the season from one extreme point of the lake to the other, there is great reason to limit these tacit liens to the season of navigation, and not extend them beyond one year, unless there are special circumstances contradicting the presumption which delay creates, especially when the rights of purchasers intervene. *Ibid.*

7. Where libelants suffer a claim to sleep three years, with repeated opportunities to enforce it, and no excusatory circumstances exhibited, the presumption is strong and conclusive that the lien is waived. *Ibid.*

LOCAL REGULATIONS.

See MUNICIPAL REGULATIONS.

LOOK-OUT.

1. Where, in the night time, a steamer like the *Atlantic*, of great power and speed, there being a haze or fog on the lake, making it difficult to distinguish objects at any considerable distance—on a route, and at a point on such route much frequented by vessels and steamers, going at a speed of fifteen miles an hour, the second mate and wheelsman being the only officers on deck, and they both in the pilot-house; *held*, that the *Atlantic* did not maintain a sufficient look-out. *The Ogdensburgh* ads. *Ward et al*, 139

2. A competent and vigilant look-out, stationed in the forward part of the vessel, with an unobstructed view, is indispensable to exempt the steamboat from blame in case of accident in the night time, while navigating waters on which it is accustomed to meet other water craft. Nor is the inside of the pilot-house the proper place for the stationing of a look-out. *Ibid*.

MI

MANDATORIES.

1. To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority. If delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who in legal language, are termed mandatories, or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. *The Schooner Amado* ads. *Lieutenant Rogers*, 400

2. No consul in any country, particularly in an enemy's country, nor the commander of an American frigate, has any authority, by virtue of their official stations, to grant any license or permit which could have the legal effect of exempting the vessel of an enemy from capture or confiscation. *Ibid*.

MARINER.

1. A female employed as cook on board of a vessel is a mariner, and is entitled to sue in the admiralty for her wages. *The*

Schooner Brandywine ads. *Emily Sageman*, 5

2. A seaman, who is at same time part owner of a vessel in which he serves, is not thereby precluded from libeling in admiralty for wages. *The Steamboat Pilot No. 2* ads. *Foster*, 215

3. And where, under such circumstances, the vessel is sold at sheriff's sale, on a judgment against all the owners, the lien of the owner so serving is not cut off, but he may proceed by libel to enforce his lien. *Ibid*.

See SALVAGE, 7, 8, 9, 10, 11. *The Ship John Taylor*, 341

See COGS, 2. *The Ship Cabot*, 348

See MARSHALING OF CLAIMS, 3. *The America*, 195

MARSHALING OF CLAIMS.

1. The claim of the stevedore for loading and unloading the vessel, and that of a commercial firm for supplies furnished her before the fire which rendered necessary the services of the salvors, cannot be permitted to interfere with the claims of the latter, but may be paid out of any remnant in the registry. *The Bark Pandora* ads. *Emerson*, 438

2. Where a boat has been sold under an order of the Court of Admiralty, and the proceeds paid into the registry, and the fund is insufficient to pay all the claims against it, on a question of distribution, the claimants will be paid according to their priorities of privilege. In this case: 1. Claims of seamen for wages; 2. Material men having a lien by the general maritime law; 3. Material men having a lien by virtue of a seizure under a state law, without reference to priority of seizure. *The Superior* ads. *Dudley et al*, 176

3. When the parts of a wrecked vessel are saved by the owners, and not by sailors, the court, in marshaling the liens and disposing of the proceeds of the sale of the property, will order payments in discharge of the liens, 1st. To seamen: 2d. To material men. *The Tackle, &c., of the Steamboat America* ads. *Bruce*, 195

MATERIAL MEN.

1. The district courts of the United States have a general admiralty jurisdiction.

tion *en rem*, in suits brought by material men against foreign ships, and in cases of domestic ships, where the local law gives a lien. *The Schooner Samuel Strong* *ads. Wick*, 187

2. Where a material man has a lien upon a vessel under the general maritime law of the United States, he has a right to enforce that lien by a suit in the United States court, although the vessel may have been subsequently seized and sold under the Missouri "act concerning boats and vessels." *The Golden Gate* *ads. Ashbrook*, 296

3. The same law which gives the lien may also divest the lien. *Ibid.*

4. The lien of material men under the general maritime law depends upon the residence of her owners, not upon the port of her enrollment. *The Golden Gate* *ads. Hill & Conn*, 308

5. Where the general charterers of a ship and the material man both reside in Missouri, the latter had no lien upon the vessel. *Ibid.*

See MARSHALING OF CLAIMS, 1. *The Pandora*, 438

See DOCKAGE, 1, 2, 3, 4. *The Buckeye State*, 69

See MARSHALING OF CLAIMS, 3. *The America*, 195

MEASURE OF DAMAGES.

See DAMAGES.

MORTGAGE.

1. Where a mortgage or hypothecation of a vessel was given for money borrowed in a foreign port, by the master, to make repairs, containing a special stipulation that the usual marine risk in cases of bottomry and hypothecation shall not be taken, and a bill drawn at the same time, neither instrument gives a lien upon the vessel enforceable in admiralty. *The Brig Atlantic*, 514

MUNICIPAL REGULATIONS.

1. The corporations of cities and towns on the Mississippi river, when authorized by the legislatures of the different states, within which those cities and towns are situated, have the right to pass rules and

regulations relative to their landings; and it is the duty of this court to respect them. *The Steamer Southern Belle* *ads. Culbertson*, 461

2. Testimony introduced to show that the ordinances of the town of Grand Gulf, fixing the places of landing for steamboats and flat-boats, are rarely enforced by the authorities of the town, can have no influence with this court; for if the fact be so, it may serve to show a gross dereliction of duty on the part of those who have been charged with the execution of those ordinances, but can afford no ground for this court to decree that they are to be totally disregarded. *Ibid.*

N

NAVIGATION. NAVIGABLE STREAMS.

1. All navigable streams should be left open, and no one has a right to obstruct the path of vessels along their channels. *The Steamboat "C. D. jun."* *ads. Lallande et al.*, 501

2. Where a raft had been driven by the *vis major* into a channel of the river, and obstructed it, and had remained there an unreasonable length of time, and no anxiety had been exhibited by the party in charge, no exertion made by him to extricate it, this would afford ample ground for the master of a steamboat to take the necessary steps for its removal. *Ibid.*

3. But where every effort was made to remove the raft from the channel, no apprehension of a pecuniary loss on the part of a steamboat from a reasonable delay, would afford an excuse or justification for the violent and summary destruction of the raft, by the master of the steamboat. *Ibid.*

4. Doubtful words in a statute if not scientific or technical, are to be interpreted according to their familiar use and acceptance. The phrase "going off large," is nautical, and signifies having the wind free on either tack. *The Brig Fashion* *ads. Ward et al.*, 8

5. The term "navigable waters," used in the act of Congress of 26th February, 1845, is not to be understood in the same sense as "natural streams;" and must be held to include an artificial communication

such as the Welland canal. *The Young America* ads. *Scott*, 101

6. A vessel in nautical technicality, is "going off large," when the wind blows from some point "abaft the beam;" is "going before the wind," when the wind "is free," comes over the stern, and the yards of the ship are braced square across. *The Buffalo* ads. *Hall*, 115

7. The intention of Congress has been clearly manifested by the act of 18th of May, 1796, to ordain all rivers actually navigable, as common law rivers, whether or not the tide ebbs and flows. *The Brig Empire State*, 641

8. Wharves or docks must be constructed so as not to impair, but facilitate navigation and commerce, and as such be open to the landing of all—the moorage of all vessels, without "tax, impost or duty." *Ibid.*

9. When a highway upon the land, and another upon the water, adjoin, the right of passage from one to the other is free to all. *Ibid.*

NEGRO.

See COLORED PERSONS.

NEUTRALITY.

1. Upon the breaking out of war between the United States and the republic of Mexico, the province or department of Yucatan, belonging to Mexico, having assumed a flag of her own, and having manifested a determination to remain neutral, a special order was issued by the President of the United States, exempting her citizens from the operation of the laws of war, under such circumstances, no citizen or resident of Yucatan, could with impunity violate the neutrality by assuming for the purposes of trade the flag of the enemy. *The Cargo of El Telegrafo* ads. *The United States*, 383

2. It is a principle of the law of prize as recognized by the Supreme Court of the United States, 9 Cranch, 388, that the two maxims of "free ships, free goods," and "enemy's ships, enemy's goods," are not necessarily connected. The primitive law, independent of international compact, rests on the simple principle, that war gives a right to capture the goods of an enemy, but gives no right to capture

the goods of a friend. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property. *Ibid.*

3. From the foregoing principle it follows, that a distinction may be drawn between the vessel sailing under the flag of the enemy and her cargo belonging to a neutral; but if it appear that the neutral has by his residence in the enemy's country acquired a domicile there, his property will be considered as enemy's property. *Ibid.*

OBSTRUCTION.

See NAVIGATION AND NAVIGABLE WATERS.

OWNERS.

See CHARTER PARTY. *Eames v. Covaroc*, 528

See SALVAGE, 2. *The Ship Charles*, 329

See ENROLLMENT, 2, 3. *The Superior*, 176

See CONTRACT OF AFFREIGHTMENT, 1, 2. *The Julia Smith*, 61

1. Where several part owners having unsettled accounts between them, petition for a statement of account and payment of their shares, and the managing owner of the boat asks that the whole should be paid over to him, it would be unjust to pay the surplus to the managing owner, and turn the other petitioners over to a bill in chancery, for the recovery of their interest, and it would operate oppressively to retain the amount in the registry of the court until the matter was settled in equity. *The L. B. Goldsmith*, 123

2. The lien of a material man under the general maritime law, depends upon the residence of her owner, not upon the port of her enrollment. *The Golden Gate* ads. *Hill & Conn*, 308

3. When there is a charter party, and by its terms, the charterers are to have exclusive control, possession and management of the vessel, to appoint the master, run the vessel, and receive the entire profits, they, and not the general owners, are to be deemed the owners.

and are alone responsible for damages and contracts. *Ibid.*

4. A seaman who is at the same time a part owner of the vessel in which he serves is not thereby precluded from libeling in admiralty for wages. *The Pilot No. 2 ada. Foster*, 215

5. A. & B. were, with others, part owners of a vessel, and also served on board as mariners. The vessel was sold on execution out of a state court, on a judgment against all the owners. *Held*, that the sale not affecting the liens of seamen, A. and B. might libel the vessel in the hands of the purchaser at sheriff's sale, for wages due prior thereto, notwithstanding the former part ownership. *Ibid.*

P

PART OWNER.

See OWNERS.

PARTIES.

1. It is the duty of salvors, in bringing suit for salvage, to make all the co-salvors parties, otherwise the court cannot do full justice to all concerned. *The Steamboat Edward Howard*, 522

2. Where a few of the salvors present themselves in court, conceal from the court the names of others who equally participated in the salvage services, the court would feel bound to dismiss their libel. *Ibid.*

PARTNERSHIP.

1. W. being owner of the steamboat Detroit, agreed with T. that he might run the boat during two sailing seasons. The boat was to be under the control of T. and he was to appoint all the officers and crew of the boat except the clerk. The clerk was to be under the control of W. and to make reports to him of the receipts and expenditures of the boat. The receipts were to be applied, 1st, to the payment of the boat's expenses; 2d, to her insurance; 3d, to the payment of \$6,000 to W., and the balance to be divided between W. and T. T. was to be allowed \$300 per annum for his services as agent of the boat. *Held*, that although by this agreement the parties became partners after a certain event, in the profits of the

business of the boat, they were not partners to such an extent as to oust the admiralty court of jurisdiction in a cause for the recovery of damages for a breach of the agreement. *Ward v. Thompson*, 95

2. Where T. was to run the boat of W. for a fixed period, under a special agreement, by the terms of which the earnings of the boat were to be applied, 1st, to payment of the boat's expenses; 2d, her insurance; 3d, a given sum to W., the owner, and the balance to be divided between W. and T. *Held*, that until the expenses, insurance money and the given sum to be paid to W. were realized, T. was but the bailee or agent of W. *Ibid.*

3. Under the 43d rule of admiralty practice, the party entitled to remnants on the surplus in court, can only obtain it by petition or motion, and any one having an interest has a right to intervene "*pro interesse suo*," whether his application involves the settlement of partnership accounts or not. *The L. B. Goldsmith*, 123

4. See OWNERS, 1.

Ibid.

PAYMENT.

1. A receipt of payment by note, is only *prima facie* evidence of payment, which may always be explained by other testimony. *The Steamboat Fashion ada. Moore & Foote*, 49

2. A receipt unexplained, is conclusive, and the party against whom it is produced must establish its character, if he wishes to avoid its legitimate effect. *Ibid.*

See LIEN, 12, 13, 14, 15.

Ibid.

PENAL STATUTES AND ACTIONS.

1. The eighth section of the act of 28th of February, 1799, in relation to prosecutions upon a penal statute, by an informer, contemplates an action in the name of the informer alone, as well as in the name of the United States, to the use, in whole or in part, of an informer. *The Steamboat Planter ada. The United States*, 262

2. If the informer, for whose use the suit is prosecuted, in whole or in part, is not an officer of the United States, the United States cannot be liable for costs in

the cases mentioned in the said eighth section. Ibid.

3. The informer is liable for costs, however, although the United States may be a party on the record. Ibid.

4. The court may require an informer to give security for costs, and in case of refusal, strike his name from the record. Ibid.

5. By the second section of the act of Congress approved July 7th, 1838, "to provide for the better security of the lives of passengers," &c., no forfeiture of the boat is declared, and no express lien given on the boat for the penalty in case of a violation. *The Steamboat Laurel* ads. *The United States*, 269.

6. See *Linn*, 30, 32. Ibid.

POLICE REGULATIONS.

See MUNICIPAL REGULATIONS.

PLEADINGS.

See PRACTICE.

POSSESSORY SUITS.

1. The twenty-second rule in admiralty, prescribing the mode of procedure in petitory and possessory suits, requires a joint proceeding *in rem*, and *in personam*. *The Propeller S. C. Ives* ads. *Kynoch*, 205.

2. To allow a libel in such a case to be amended so as to proceed for damages *in personam*, would be inconsistent with the established rules of admiralty practice. Ibid.

PRACTICE.

1. If, upon the return of the monition (in a prize cause), no person appears to assert a claim to the vessel and cargo, the proctor of the captors may move for a decree upon the evidence as it appears upon the record. *The Bark Coosa* ads. *Commodore Conner*, 393.

2. If the claimant be a citizen or an ally, at the same time that he makes out his interest, he confesses the commission of an offence, which, under a well known rule of the civil law, deprives him of a

right to prosecute his claim. *Ex turpi causa, non oritur actio*. Ibid.

3. Parties to suits in admiralty must be bound by their allegations and proofs, and the former, to be effectual, must be sustained by the latter. *The Ship New England* ads. *Kramme*, 481.

4. When the allegations of the libel are not sustained by proof, the libel will be dismissed. Ibid.

5. The case presented by the pleadings in a cause is the only one upon which the court can be called to adjudicate. *The Bark Oregon* ads. *Rodocanachi*, 504.

6. In a cause of damage to cargo, where the libel alleges the fault of the master to be, 1st. That he falsely represented his vessel to be tight, staunch and seaworthy; and 2d. That the damage resulted from the master's carelessness, negligence and improper conduct, the libellant cannot claim another specific ground of complaint not set up in the libel, as that the danger was caused by the fault of the master in not putting into some other port to repair his vessel, and take measures to preserve his cargo. Ibid.

6. When by consent of parties, the answer of the respondent stands as a cross libel, the court may, if a proper case is made, decree full damages for the respondent against the libellant. *The Ogdensburgh* ads. *Ward et al.*, 139.

7. Under Rule 15, of the admiralty, the libellant may proceed: 1st, against the ship and master; 2d, against the ship; 3d, against the owner alone; 4th, against the master alone. A proceeding *in rem* against the ship, and *in personam* against the owner, not being authorized by the rule, is prohibited. Ibid.

8. Allegations in pleadings are admissions by the pleader and need no proof, unless denied and put in issue, and as against the pleader will always be taken as matter conceded. *The Brig Fashion* ads. *Ward et al.*, 8.

9. Where a party applying to a court of admiralty to set aside a sale, is guilty of inexcusable laches, in making his application, the motion will not be granted. *The Propeller Napoleon* ads. *Pease*, 37.

10. As to whether there are circum

stances or not under which the court would set aside a regular sale in admiralty or not. *Quere?* Ibid.

11. Under the circumstances a delay of six months was inexcusable. Ibid.

12. At any stage of a proceeding in admiralty until final hearing the question of jurisdiction is open. *Ward v. Thompson*, 95

13. A rule of practice established by virtue of an act of Congress, has the force of a statute. *The Young America* ads. *Scott*, 107

14. Upon a motion to vacate an order *pro confesso*, and for leave to answer, the respondent must satisfactorily account for his laches, and exhibit by answer or affidavit a meritorious defence. Ibid.

15. Under the 43d rule of admiralty practice, the party entitled to remnants, or the surplus in court, can only obtain it by petition or motion, and any one having an interest has a right to intervene *pro interesse suo*, whether his application involves the settlement of partnership accounts or not. *The L. B. Goldsmith*, 123

See PARTIES, 1, 2. *The Steamboat Edward Howard*, 522

See COSTS, 5, 6. *The Steamer Norma*, 553.

See OWNERS, 1. Ibid.

See INTERROGATORIES, 1, 2. *The El Telegrafo*, 383

See SUBROGATION AND SURETY, 4. *The T. P. Leathers*, 432

See DECREE, 1, 2, 3. *The Brig Fashion and Steamboat Pacific*, 41

See POSSESSORY SUITS, 1, 2. *The S. C. Ives*, 205

See PENAL STATUTES, 1, 2, 3, 4. *The Steamboat Planter*, 262

PRESUMPTIONS OF PAYMENT.

See LIMITATIONS.

PRIORITY.

See LIMITATIONS.

PRIZE.

See ENEMY'S PROPERTY, 1, 3. *The Juanita*, 852

See NEUTRALITY, 2. *The El Telegrafo*, 353

See ENEMY'S PROPERTY, 7. *The Bark Coosa*, 393

See ENEMY'S PROPERTY, 8. *The Schooner Amado*, 400

See LICENSE, 2. Ibid.

PROCTOR.

1. Negotiations for the adjustment of a suit in admiralty should be conducted in the presence of the proctors of the parties, as they have a personal and legal weight, and a direct responsibility to the court. *The Ship Cabot* ads. *McDonald*, 348

See COSTS, 1, 3. *The Ship Cabot*, 348

PROMISSORY NOTE.

1. Where a creditor of a vessel, on taking a promissory note upon a demand for which, by law he has a lien upon a vessel, accompanies the act with the evident intention of looking only to the note, and not to the vessel, for payment, such intention, however manifested, operates as an abandonment of the lien. *The Steamboat Fashion* ads. *Moore and Pooe*, 49

2. Where a boat's creditor receives a promissory note upon his demand, and where the circumstances show that the only design in taking the note was to grant an extension of time for payment of the demand: *Held*, that there was no abandonment of the lien upon the boat, which had previously existed. Ibid.

3. See LIEN, 12, 14, 15. Ibid.

4. See PAYMENT, 1, 2. Ibid.

PROTEST.

1. A protest cannot be received in our courts as evidence for the master or owner, but may be evidence against him and them. *The Brig May Queen* ads. *Marri-mac*, 464

2. The protest of the captain and crew, made the morning after the collision, when admitted in evidence, may be considered as evidence corroborative of the testimony of the witnesses in court, where as to all material facts they correspond. *The Brig Fashion* ads. *Ward et al*, 8

3. It is a useful and proper precaution.

for a master of a vessel to note a protest at the first port of his arrival, after an accident, but it is not an indispensable duty. *The Propeller Cleveland* ads. *Hunt*, 221

RE

RECEIPT.

1. When a receipt is introduced as evidence of the contract of affreightment, the whole document is in proof, and one part cannot be separated from the other in its judicial interpretation. *The Steamer Arrow* ads. *Butler*, 59

2. After the voyage had been completed, the clerk of a steamer sailing between Sandusky, Ohio, and Detroit, Michigan, gives the following receipt to the owner of a horse lost between Detroit and Chatham, another steamer having taken the horse at Detroit:

"Received of T. B. three dollars for transporting horse from Sandusky to Chatham. One dollar for the steamer Ploughboy, and two dollars for the Arrow. The horse (by consent) transferred to the Ploughboy, October 30, 1852." Parol evidence was admitted to explain the receipt. *Ibid*.

3. A receipt of payment by note is only *prima facie* evidence of payment, which may always be explained by other testimony. *The Steamboat Fashion* ads. *Moore et al*, 49

4. A receipt unexplained is conclusive, and a party against whom it is produced must establish its character, if he wishes to avoid its legitimate effect. *Ibid*.

RECORDING ACT

1. The act of Congress, entitled, "An act to provide for recording the conveyances of vessels, and for other purposes," (9 L. & B. 440), does not extend to charter parties. *The Golden Gate* ads. *Hill & Conn*, 308

REGISTERED VESSEL.

See ENROLLMENT.

REMNANTS.

See PARTNERSHIP.

REINHARING.

See EVIDENCE, 1. *The Georgia and Dresden*, 474

S

SALVAGE.

1. A salvor is a person who without any particular relation to a ship in distress, proffers useful service and gives it as a voluntary adventurer, without any pre-existing covenant, that connected him with the duty of employing himself for the preservation of that ship. *The Ship Charles* ads. *Evans et al*, 628

2. The owners of the saving vessel are clearly entitled to be paid a proportion of the amount awarded by the court as salvage compensation; and *one-third* is the proportion usually awarded to such owners because of the risk and danger to which their property is exposed in the performance of the salvage service. *Ibid*.

3. In cases of salvage, a court of admiralty will not indulge mere possible conjectures. If the fact that the vessel has been saved be clear, the presumption that she might otherwise have been saved is mere matter of conjecture in *nubibus*. Salvors are not to be driven out of court upon the suggestion that if they had not touched a derelict ship and cargo, the latter might, in some possible way, have been saved from all calamity, and therefore that the salvors have little or no merit. *Ibid*.

4. It has been customary to award a *moiety* in cases of derelict, but the rule is by no means *inflexible*, and courts of admiralty, both in England and America, have been governed in their decrees, by the peculiar circumstances of each particular case. *Ibid*.

5. Where some of the salvors decline asserting a claim for salvage compensation, their proportion will not accrue to the benefit of either their co-salvors or to the owners of the saving vessel. *Ibid*.

6. In salvage cases, which are frequently of great importance, and where propositions of compromise are often ambiguously made, and often liable to misconception, the admiralty court in England disregards all tenders, except those formally made by acts of court. It is not known that this doctrine has been adopted

by the courts of the United States; but the general practice is in salvage cases, to make tenders by formal acts of court, which are legal memoranda of the nature of pleas. Ibid.

7. The crew of a wrecked vessel, who have by meritorious exertions saved the tackle and furniture of that vessel, have a claim for compensation in the nature of salvage upon the property so saved. *The Ship John Taylor* *ads. John Cartwell et al.*, 341.

8. It is the general doctrine of the English maritime law, from which ours is derived, that the payment of wages is dependent upon the earnings of freight. If no freight be earned, no wages are due, for freight is the mother of wages; but, in cases of shipwreck where the seamen cannot earn wages and yet perform a meritorious service, they are entitled to a salvage compensation for their labor and services in preserving the wreck of the ship and cargo, or either. Ibid.

9. Where salvage is allowed to seamen for services performed in preserving the wreck of their own vessel and her cargo, the amount of wages they were receiving at the time of the disaster, is a safe and proper criterion to be adopted by the court in fixing the *quantum* of salvage they are to receive. Ibid.

10. Compensation in such a case allowed to seamen, must be paid out of the proceeds of the property saved. Ibid.

11. In awarding a salvage compensation at the rate of *fifty per cent.*, in accordance with the stipulations of a written contract between the United States consul at Havana of the one part, acting for the master, owners and underwriters of the wrecked ship, and the master of the schooner *Warrior* of the other part, in pursuance of which the said schooner came to the relief of the wrecked vessel, the court will not give the whole compensation to the master and owners, and leave the seamen to look to the other moiety for their reward. The contract is not a rule that binds the court to grant so large a per centage on the value of the property saved to the master and owners only, as ostensible parties to the agreement, when it is shown that the dangers and toils incident to the enterprise, have been shared by the seamen, who were doubtless induced to embark in the undertaking by the very fact that

such a contract was entered into by the master. Ibid.

12. In a case of salvage, it is immaterial whether the master of the vessel requiring assistance formally surrenders the vessel into the hands of salvors or not, if it appear that he called for assistance, and that neither he nor his crew actively participated in the salvage service. Their presence, merely, cannot be permitted to detract from the meritorious character of the services performed by the salvors. *The Bark Delphos* *ads. The Union Tow-Boat Company*, 412.

13. The aid rendered to a burning vessel by tow-boats whose services were not actually required to rescue the vessel from her perilous situation, will be regarded as superfluous. And the court, in estimating the value of the tow-boats employed in the salvage service, will look to the evidence to ascertain how many were really necessary for the accomplishment of the object in view, and treat all others as supernumeraries, which being in sight of the burning vessel, rendered assistance not actually required. Ibid.

14. While such assistance is not to be deprecated by the court, it cannot be received as a reason for increasing the estimate of the property put at risk, and thereby enhancing the claim of the owners for salvage compensation. Ibid.

15. A tow-boat company cannot be treated as a salvor, but as the owner of property (their tow-boats), which is put at risk in the salvage service, are to be compensated like all other owners of vessels under similar circumstances. Ibid.

16. Salvage is not always a mere compensation for work and labor. Various considerations: the interests of commerce and navigation, the lives of the seamen render it proper to estimate a salvage reward upon a more enlarged and liberal scale. Ibid.

17. The ingredients of salvage are: First. Enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow citizens. Secondly. The degree of danger and distress from which the property is rescued, whether it was in imminent peril and almost certainly lost, if not at the time rescued and preserved. Lastly. The value of the property saved. Where all these circumstances concur, a large and liberal

reward ought to be given; but where none, or scarcely any take place, the compensation can hardly be denominated a *salvage* compensation. It is little more than a mere remuneration *pro opera et labore*. Sir JOHN NICHOLL, in the case of *The Clifton*, 3 Haggard, 117. Ibid.

18. Mere speculative danger will not be sufficient to entitle a person to salvage; but the danger need not be such that escape from it by other means was impossible. It cannot be necessary that the loss should be inevitably certain; but it is necessary that the danger should be real and imminent. *Talbot v. Seeman*, 1 Cranch. Ibid.

19. It is rare that we find combined in a single case all the ingredients of a salvage service; but we must not, therefore, lose sight of those which prominently appear, from the evidence, to command our approval or elicit our commendation. Ibid.

20. In questions of salvage, no distinction can be made between the boat and cargo, both being subject to the same rule of law. *The Steamboat T. P. Leathers* *ads. Montgomery*, 421.

21. A salvage compensation can be awarded only to persons by whose agency and assistance the vessel or cargo may be saved from impending peril, or recovered after actual loss; and salvage will not be allowed unless the property be saved in fact by the parties who make the claim. Intentions, however good, and exertions, even though they be perilous and heroic, are not sufficient to sustain a claim for salvage. Ibid.

22. The drawing a boat off when aground, is a common act of courtesy among steamboats, for which no claim for salvage is ever asserted. Ibid.

23. The surrender of the imperiled boat by its master, to the care and protection of the master and crew of the steamer Robb, virtually dissolved the contract between the surrendered boat and its pilot, and the pilot by important services subsequently rendered beyond the line of his duty, as such, is entitled to claim as one of the salvors. Ibid.

24. The rate of salvage is not governed by the mere extent of labor. The value of the property saved, the degree of hazard in which it is placed, the enterprise, intrepidity and danger of the service, and

the policy of a liberal allowance for timely interposition of maritime assistance, all conspire to increase the amount of the salvage. When the value of the property is small and the hazard great, the allowance is in greater proportion; on the other hand, when the value is large and the services highly meritorious, the proportion is diminished. Ibid.

25. Where the master of a vessel on fire gives authority to another to save what he can, and look to the property he may be enabled to save for his compensation, the person thus authorized is to be regarded in the light of a *salvor*, and is to be compensated as such out of the proceeds of the property saved. *The Bark Pandora* *ads. Emerson*, 438.

26. The owners of a steamboat, for services in towing a burning vessel from one shore of the river to the other, are entitled to a reasonable compensation for towage; but they are not, for that service alone, entitled to salvage. Ibid.

27. See MARSHALING OF CLAIMS. Ibid.

28. See JURISDICTION, 2. *The Bark Jenny Lind*, 443.

29. The stipulations of a written contract will be recognized no further in a court of admiralty charged with a case of salvage, than they accord with the opinion of the court in the exercise of a sound discretion. *The Jenny Lind* *ads. Williams*, 443.

30. This court, as a court of admiralty, cannot be called upon to enforce the specific performance of such a contract, though such a contract may and often does form a fair and equitable criterion in fixing the *quantum* of salvage compensation. Ibid.

30. When a part of the crew of a vessel at sea are dead, and all the rest physically and mentally incapable of providing for their own safety, this is not what is known as *derelict*, but *quasi derelict* in the admiralty. *The Bark George Nicholas* *ads. Sturtevant*, 449.

31. In a case like the present, one-third, clear of all expenses, of the property saved, was deemed a liberal allowance. Ibid.

32. The assignment of a claim for salvage divests the lien originally existing in favor of the salvor, and confers no right upon the assignee to claim reimbursement in a court of admiralty. Ibid.

33. When a steamboat is in actual peril, and one is requested to take charge of her and save her, if possible, with no stipulation as to time or wages, the fact of acting as master, not having been so before, will not deprive him of the right to claim salvage. *The Steamboat Pontiac* ads. *McGinnis*, 130
34. The fact of peril is to be ascertained from the circumstances surrounding the boat at the time when the salvage service commences, and the fact of escape is not to be taken as proof that there was no peril. *Ibid.*
35. The fact that the exertions of the salvor alone did not save the boat, she being finally saved by the particular manner in which the ice broke up, does not deprive him of the reward due a salvor, if he encountered the danger and did all that could be done, under the circumstances. *Ibid.*
36. There is no fixed rule of compensation for salvage services. It must depend upon the particular circumstances. It may be a per centage upon, or a certain proportion of the thing saved, or a fixed sum to be assessed *pro rata* upon the boat and cargo. In this case the latter course is adopted. *Ibid.*
37. A lien exists for salvage services upon the property saved. *The H. D. Bacon* ads. *Eads et al.*, 274
38. It requires the most unequivocal acts on the part of the salvors, to show that they intend to abandon their lien and resort to the owners for payment. *Ibid.*
39. The true rule of construing salvage contracts is, that they shall be presumed *prima facie* fair, but if proved to be unconscionable, the Court of Admiralty, like the court of equity, in similar cases, would refuse to enforce it. *Ibid.*
40. Admiralty courts have never put the compensation for salvage services upon the basis of pay for work and labor, but have ever considered that it was for the interest of commerce and navigation, that a liberal compensation should be allowed, and in proportion to the benefit received by the owner. *Ibid.*
41. Where the salvors, by the use of their machinery and diving-bell, worth \$20,000, raised a badly stunken steamer, in the Mississippi, valued at \$20,000, in twelve hours; *Held*, that the contracted price of \$4,000 was but just and reasonable. *Ibid.*
42. It is the duty of salvors in bringing suit for salvage, to make all the co-salvors parties, otherwise the court cannot do full justice to all concerned. *The Steamboat Edward Howard*, 522
43. Where a few of the salvors present themselves in court, conceal from the court the names of others, who equally participated in the salvage services, the court would feel bound to dismiss their libel. *Ibid.*
44. Where a fair and liberal allowance as salvage is tendered to the libelants or their proctors, the court will be bound to decree costs against the libelants, to be paid out of their distributive share. *Ibid.*
- See TOW-BOATS AND TOWAGE, 3. *The S. W. Downs and Storm*, 468
- ### SEAMEN.
1. The act of July 20, 1790, for the government and regulation of seamen in the merchant service, providing that if an agreement in writing be not made, &c., with seamen, they shall be entitled to the highest rate of wages that shall have been paid for a similar voyage within three months preceding the shipping, does not apply to seamen upon tug boats. *The Propeller B. F. Bruce*, 539
2. Where a seaman was proved to have served the year previous for a particular rate of wages, and shipped with no agreed rate; *Held*, that in the absence of contrary proof, the last year's wages would be presumed right, and taken as the measure of wages for the present. *Ibid.*
- See MARINER.
- ### SET-OFF.
1. In the case of a libel for repairs to a vessel, whether an estimate of profits that the vessel might have made had she not been unreasonably detained by the libellant in making the repairs, can be allowed as a set-off to the libellant's bill. *Quere? The Steamer Buckeye State* ads. *Ives*, 69
- ### SIGNAL LIGHTS.
- See LIGHTS.

SLAVE.

See COLORED PERSON.

SMUGGLING.

See IMPORTATION OF GOODS.

SPECIFIC PERFORMANCE.

See SALVAGE, 29, 30. *The Jenny Lind*, 443

STALE CLAIM.

See LIMITATIONS.

STATUTES COMMENTED ON AND CONSTRUED.

1. The Michigan statute for the collection of claims against ships, boats and vessels, and declaring lien thereon, for supplies and materials, makes no equal provision for claims arising in other states. *The Schooner John Richards* *ads. Riggs*, 73

2. The proceedings before a circuit court commissioner of the state of Michigan, under the "boat and vessel" law of said state, cannot be considered as a proceeding *in rem*. *Ibid.*

3. Proceedings *in rem* are peculiar to admiralty courts. They are international and not municipal. *Ibid.*

4. Whenever municipal law appropriates the remedy *in rem* against vessels, it comes in direct conflict with the 2d section of the 3d article of the constitution of the United States. *Ibid.*

5. State legislatures have no power to divest a lien existing in admiralty. *Ibid.*

6. The possession of the vessel by the sheriff under state process, did not divest the lien in admiralty, or affect the process in the hands of the marshal. *Ibid.*

7. The act of Congress of the 26th of February, 1845, did not enlarge the jurisdiction of the national courts as to questions of admiralty. *The Young America* *ads. Scott*, 101

8. The term "navigable waters" used in the act of Congress of 26th of February, 1845, is not to be understood in the same

sense as "natural streams," and must be held to include an artificial communication such as the Welland canal. *Ibid.*

9. The act of the legislature of Ohio entitled, "An act providing for the collection of claims against steamboats and other water crafts and authorizing proceedings against them by name," passed February 26th, 1840, and the act explanatory thereof, passed February 24th, 1848, does not create a lien; it only affords a remedy. *The Schooner Sam. Strong* *ads. Wick*, 187

10. These statutes being in derogation of the common law should be construed strictly. *Ibid.*

11. When a state statute has received a construction by the supreme state courts, that construction is binding upon the federal courts. *Ibid.*

12. The Supreme Court of Ohio, have decided that their water craft law does not create a lien. See 14 Ohio, 410. *Ibid.*

13. The 5th section of the act of Congress of March 3, 1849, requires a vessel on the starboard tack to show a red light, and a vessel having the wind free a white light. It also requires sailing vessels to have reflectors to their lights as well as propellers and steamers. *The Miranda* *ads. Foster*, 227

14. The act of 1849, did not intend to abrogate the rules which have been generally observed for the management of vessels; it only adds a new one. *Ibid.*

15. The act of Congress, approved July 7th, 1838, "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," is founded upon article 1, section 8, clause 3 of the constitution, giving Congress power "to regulate commerce with foreign nations, and among the several states," &c. *The Steamboat Jas. Morrison* *ads. The United States*, 241

16. If commerce is completely internal, confined to one state, Congress has no power over it. *Ibid.*

17. There is no law previous to the act of July 7th, 1838, requiring a ferry boat plying wholly within the limits of a state, to obtain a license. *Ibid.*

18. The act of 7th of July, 1838, does not apply to such ferry boats. *Ibid.*

19. The act of July 7th, 1838, "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," was not intended by Congress to apply to all steamboats, but only to such as before the passage of that act were required to be enrolled and licensed for the coasting trade. *The Ferry Boat Wm. Pope* ads. *The United States*, 256
20. Under the laws of Congress enacted prior to that of 1838, ferry boats were not required to be enrolled and licensed. *Ibid.*
21. The words "coasting trade" mean, the trade along the shore, and the business of a ferry boat is not included therein. *Ibid.*
22. The laws of the United States contain no regulations for ferries as such. *Ibid.*
23. The 8th section of the act of 28th of February, 1799, in relation to prosecutions upon a penal statute by an informer, contemplates an action in the name of the informer alone, as well as in the name of the United States, to the use in whole or in part of an informer. *The Steamboat Planter* ads. *The United States*, 262
24. By the 2d section of the act of Congress, approved July 7th, 1838, entitled "An act for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," no forfeiture of the boat is declared, and no express lien is given on the boat for the penalty, in case of a violation. *The Steamboat Laurel* ads. *The United States*, 269
25. The expression in the second section, "for which sum or sums the steamboat or vessel so engaged shall be liable," is simply used to give a remedy against the boat by libel, and was not intended to give a lien express or implied. *Ibid.*
26. See LIEN, 30. *Ibid.*
27. The act of the legislature of Missouri, entitled "An act concerning boats and vessels," does not abrogate, displace, or supersede, any lien given by the general maritime law of the United States. *The Henrietta* ads. *Harris*, 284
28. A seizure and sale under the Missouri "act concerning boats and vessels," does not divest a lien given by the general maritime law. *Ibid.*
29. The admiralty and maritime law of the United States except where it is changed by act of Congress, is as much the law of the United States, as if it had been formally enacted word for word in a statute. *Ibid.*
30. The laws of the United States "are the supreme laws," and cannot be changed or altered, modified or repealed, by state enactments. *Ibid.*
31. No right or privilege given or secured by the laws of the United States can be abrogated, displaced or superseded by state enactments. A lien is such a right. *Ibid.*
32. If a state legislature should pass an act declaring that a maritime lien should have no effect in that state, or should be postponed to liens given by the laws of that state, such enactments would have no binding force or effect. *Ibid.*
33. Under the judiciary act of 1789, the courts of the United States, have cognizance of all cases of admiralty and maritime jurisdiction exclusive of the state courts except as to the common law remedy. *The Golden Gate* ads. *Ashbrook*, 296
34. The common law remedy existed before the constitution and act of 1789, and by the latter was saved not given. It is a remedy by action at common law, not a proceeding *in rem*. A proceeding *in rem* is not a common law remedy. *Ibid.*
35. The proceedings under the statute of Missouri entitled "An act concerning boats and vessels," are not strictly proceedings *in rem*. *Ibid.*
36. See LIEN, 41, 42. *Ibid.*
37. The act of Congress entitled, "An act to provide for recording the conveyances of vessels, and for other purposes," 9 L. & B. 440; does not extend to charter parties. *The Golden Gate* ads. *Hill & Coan*, 308
38. The Ohio statute of 1840, called the boat and vessel law, gives no lien upon a vessel for supplies, and has been so construed by the Supreme Court of Ohio. *The Plymouth* ads. *Scott*, 56
39. The act of July 20th, 1790, for the government and regulation of seamen in the merchant service, providing that if an

agreement in writing be not made with seamen, they shall be entitled to the highest rate of wages that shall have been paid for a similar voyage, within three months preceding the shipping, does not apply to seamen upon tug boats. *The Propeller B. F. Bruce*, 539

40. The 42d section of the act of Congress, passed August 30, 1852, entitled, "An act to amend an act, entitled, 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, passed July 7, 1838,' and for other purposes," cannot be so construed as to exclude boats or vessels ordinarily used as ferry or tug boats. *The Steamboat Ottawa*, 536

See DETROIT, CITY OF, 1, 2, 3, 4, 5. *The Brig Empire State*, 541, as to the statute authorizing the laying out of the city, and the power of the city over streets and wharves, &c.

See COLORED PERSON, 1, 2. Act of 20th of April, 1818. *The Bark Ohio*, 409

See COLLISION, 6. Act of August 30, 1852. *The Georgia and Dresden*, 474

See ENROLLMENT, 1. Act of 31 December, 1792. *The Superior*, 176

See SUMMARY PROCESS, 1, 2, 3. Act of 1790, section 6. *The Steamboat London ads. Kief & Lang*, 6

See LIGHTS, 1, 2. Act of 1849. *The Buffalo*, 115

See JURISDICTION, 17. Act of 1789. *S. C. Ives*, 205

STIPULATION.

See SUBROGATION AND SURETY, 1, 2, 3, 4. *The T. P. Leathers*, 432

STREETS.

See DETROIT, CITY OF, 2, 3, 4, 5, 6. *The Brig Empire State*, 541, as to the power of the city over streets, highways, wharves, and the authority by which the same were laid out.

SUBROGATION AND SURETY.

1. Where a surety on a bond or stipulation given in the admiralty pays the money in accordance with the decree of the court, he is entitled to be subrogated to the rights of the original libellant; but he cannot be paid by preference out

of the proceeds of the boat, which has been sold under his execution while there are liens already existing. *Carroll et al. v. The Steamboat T. P. Leathers*, 432

2. The moment the boat was released upon a stipulation from the custody of the law, she was also released from the lien in favor of the original libellants, and they could only have recourse upon the stipulation. The boat was at liberty to go where she might think proper, and *quoad* the claims of the original libellants, was at liberty to contract *de novo*, debts which might operate as liens in admiralty or under the local law. *Ibid.*

3. The surety on a stipulation who has paid money for his principal, can only be regarded as an ordinary creditor of the principal upon whose personal credit he relied when he bound himself for the payment of the obligation. His right to be paid out of the proceeds of a boat which has been sold under his execution must be regarded as subordinate to the claims of the interveners who have established their liens. *Ibid.*

4. It is the surety's own fault if he fails to exact of his principal a separate stipulation to indemnify him against loss; and although the rules in admiralty are silent with regard to this form of stipulation, yet as a familiar and well established part of the civil law and general admiralty practice the court would not hesitate upon the application of the surety to direct it to be given. *Ibid.*

See LIEN, 4.

Ibid.

SUMMARY PROCEEDINGS.

1. The sixth section of the act of Congress of 1790, confers power on the judge or justice to issue summary process in the cases specified; and the court will not look beyond the certificate of such officer for the authority of the clerk to issue the process prescribed; but such certificate must show on its face that the commissioner had power to act. *The London ads. Kief & Lang*, 6

2. Two seamen being discharged from the steamer London at the port of Detroit, made oath, before a United States commissioner, of the amount due them as wages, who certified the same to the district clerk; on which a summons was issued, directed to the master of the vessel, to show cause why proceedings

should not be forthwith instituted against the vessel. Ibid.

3. The principal objection to the process was, that the certificate upon which it was based did not state the residence of the district judge, or that he was absent from his residence in the city of Detroit, where the Admiralty Court was held. The certificate is not sufficient. Ibid.

SURPLUS.

See PARTNERSHIP.

T

TENDER.

When a fair and liberal allowance, as salvage, is tendered to the libelants, or their proctors, the court will be bound to decree costs against the libelants, to be paid out of their distributive share. *The Steamboat Edward Howard*, 522

See SALVAGE, 6. *The Ship Charles*, 329

TOW-BOATS AND TOWAGE.

1. The owners of a steamboat, for services in towing a burning vessel from one shore of the river to the other, are entitled to a reasonable compensation for towage, but they are not, for that service alone, entitled to salvage. *The Bark Pandora* ads. *Emerson*, 438

2. See MARSHALING OF CLAIMS, 1. Ibid.

3. See LIEN, 6. *The George Nicholas*, 449

4. A steamboat, for services performed in towing other steamboats from positions where they were moored at the wharf, and thus preventing them from coming in contact with a steamboat on fire descending the river, is entitled to a compensation for towage, and not to a compensation in the nature of salvage. *The Steamboats S. W. Downs and Storm* ads. *Stevens*, 458

5. A party who in view of the danger with which his boat is threatened by the

approach of a steamboat on fire, calls for the assistance of another steamboat to remove his property from its perilous situation, will not be allowed to plead exemption from liability to pay for the services demanded, upon the ground that his property would have been safe, if left in its original position. Ibid.

6. The act of 1790, for the government and regulation of seamen in the merchant service, does not apply to seamen upon tow-boats. *The Propeller B. F. Bruce*, 539

7. The forty-second section of the act of Congress of August 30, 1852, cannot be so construed as to exclude boats ordinarily used as a ferry or tow-boat. *The Steamboat Ottawa*, 536

See SALVAGE, 2, 4. *The Bark Delphos*, 412

U

USAGE.

1. Proof of a usage long established, uniform and well known, to the effect that under a bill of lading in the usual form, with the words "privilege of reshipping" inserted, a boat from below bound to any place above the falls of the Ohio, may wait there for a rise of water for a month or more without incurring liability for not delivering the cargo, in a reasonable time, is admissible. *Broadwell v. Butler et al.*, 176

2. The proof in this case is conclusive of the existence of such usage; and, therefore, the detention of the boat with its cargo, for thirty days or upwards, does not deprive the owner of a right to recover full freight to the place of consignment, if the property was delivered with promptness, after the first rise in the river. Ibid.

3. Custom will not modify an act of Congress. *The Steamer Forrester* ads. *The United States*, 81

4. See ENROLLMENT, 8. Ibid.

W

WAIVER OF LIEN.

See LIMITATIONS.

WAGES.

1. A master of a boat has no lien for his wages as such upon the vessel he commands. *The Superior* ada. *Dudley et al.*, 176

2. The act of 1790, for the government and regulation of seamen in the merchant service, does not apply to seamen upon tug boats. *The Propeller B. F. Bruce*, 539

3. Where a seaman served one year and served another with no agreed rate of wages, the rate paid the first year will be presumed the correct measure of wages for the second year. *Ibid.*

See SALVAGE, 8, 9. *The Ship John Taylor*, 341

WAR.

1. One of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the citizens of the states at war, without the license of their respective governments. *The Bark Coosa* ada. *Commodore Conner*, 393

See ENEMY'S PROPERTY, 1, 3. *The Juanita*, 352

WELLAND CANAL.

See NAVIGATION, 5.

WHARFINGER.

1. A wharfinger's lien cannot be enforced in admiralty against a domestic vessel. *The Steamboat Asa R. Swift* ada. *Russel*, 553

2. A wharfinger is not a material man, but only a lessor, for the time being, of a part of his real estate to be used as moorage, and his lien cannot be enforced under rule 12 of the admiralty, against a domestic vessel. *Ibid.*

3. The lien of the wharfinger is only enforceable as a *common law* lien; if he part with his possession of the vessel, his lien ceases. *Ibid.*

See WHARVES.

VOL. I.

WHARVES.

1. The power of the city of Detroit over wharves is derived from the statutes of the United States. *The Brig Empire State*, 541

2. The city has no title to the fee of the streets, even when they extend into the river, and cannot occupy them or authorize others to do so. *Ibid.*

3. The city authorities have power to regulate the streets, &c., but this does not authorize them to sell, lease or exercise other acts of ownership over them. *Ibid.*

4. The city authorities may erect wharves at the termini of their streets suitable for landing, but by so doing such erections become free to the public as extensions of the streets, and the city has no authority to exact toll for ingress or egress. *Ibid.*

5. Wharves or docks must be constructed so as not to impair, but facilitate navigation and commerce, and as such be open to the landing of all—the moorage of all vessels, without “tax, impost or duty.” *Ibid.*

6. When a highway upon the land, and another upon the water, adjoin, the right of passage from one to the other is free to all. *Ibid.*

7. A lease giving the lessee “the sole and exclusive right to use the public wharf for his ferry boat,” does not authorize the collection of toll for wharfage. *Ibid.*

WITNESS.

1. The manner and demeanor of witnesses in giving testimony will be considered where they conflict in their statements. *The Steamboat Gore* ada. *Dickinson*, 45

2. When two witnesses were examined by deposition, and were subsequently examined in court, and contradicted each other, reliance is to be given to the one who is sustained by his previous testimony, rather than the other. And although the depositions were not offered by the parties, yet the court when ap-

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| <p>prised of their being on file, may call for their production. <i>The Propeller Buffalo</i> adn. <i>Hall</i>, 115</p> <p>3. In collision cases, witnesses observing passing events from different positions, cannot be expected to agree, as to locality of objects, or the relative change of position; much more must this be the case where the one making the observation is under rapid motion. Ibid.</p> <p>4. On application for a rehearing, held that declarations of witnesses as to dis-</p> | <p>tance in the night time, must be received with many grains of allowance. Conclusions drawn by witnesses as to objects discerned at a distance are uncertain. <i>The Georgis and Dresden</i>, 414</p> <p>See EVIDENCE.</p> <p style="text-align: center;">WRECK.</p> <p>See SALVAGE, 8, 9, 11. <i>The Ship John Taylor</i>, 341</p> |
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